STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals)

BRUCE B. FEYZ, an Individual

Plaintiff-Appellee

vs.

MERCY MEMORIAL HOSPITAL,
MEDICAL STAFF OF MERCY HOSPITAL,
RICHARD HILTZ, JAMES MILLER, D.O.,
JOHN KALENKIEWICZ, M.D.,
J. MARSHALL NEWBERN, D.O., and
ANTHONY SONGCO, M.D.

Defendants-Appellants,

Supreme Court No. 128059

Court of Appeals Case No. 246259

Lower Court No. 02-14174-CZ

/

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY

KERR, RUSSELL AND WEBER, PLC

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STATEMENT OF QUESTIONS PRESENTED

Was it error for the Court of Appeals to broadly interpret the malice exception to peer review immunity to include all civil rights/discrimination violations and acts undertaken with a state of mind which is "reckless of law and of the legal rights of the citizen?"

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

Amicus curiae MSMS says "yes."

For activities which occur outside the scope of peer review immunity, is there a limited exception to the doctrine of judicial non-reviewability of staffing decisions for claims which assert a failure to adhere to specified by-laws procedures, if the claims do not intervene in the hospital's decision or interfere with the peer review process?

Plaintiff-Appellant presumably says "yes."

Defendants-Appellants presumably say "no."

Amicus curiae MSMS says "yes."

STATEMENT OF PROCEEDINGS AND INTEREST[1]

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to act as *amicus* with respect to legal issues of significance to the medical profession. The Court of Appeals' decision in *Feyz v Mercy Memorial Hospital*, 264 Mich App 699; 692 NW2d 416 (2005), presents such issues.

[1] MSMS does not have independent knowledge of the facts involved in this action and relies upon the parties' factual recitation.

As credentialed members of hospital medical staffs and other physician organizations, MSMS members are actively involved in the peer review process which is mandated by Article 17 of the Michigan Public Health Code, MCL 333.20101 et seq. Many MSMS members serve on peer review committees, the purpose of which is to reduce morbidity and mortality, and to ensure the quality of medical care, as well as to review the qualifications and practices of those who provide care. MCL 333.21513. MSMS members are also the subject of peer review activities. Thus, MSMS has an active interest in the matter before this Court. In accordance with MCR 7.306(D) and this Court's December 16, 2005 Order granting leave to appeal, MSMS offers its views with respect to the malice exception to peer review immunity and the judicial non-reviewability doctrine.

SUMMARY OF THE ARGUMENT

The Court of Appeals has previously interpreted "malice" within the peer review immunity exception to mean "knowledge of falsity" or "a reckless disregard of truth or falsity." This definition is consistent with the meaning of malice in defamation cases and should not be altered. Characterizing malice as "a state of mind which is reckless of law and the legal rights of the citizen" and including within the exception all allegations of civil rights violations and discrimination – as the Court of Appeals majority did here – renders immunity an illusory protection and impedes the effectiveness of the peer review process. The protections afforded by peer review immunity should not be disturbed.

With respect to activities that occur outside the peer review process (and therefore outside the scope of immunity), limited exceptions to the doctrine of judicial non-reviewability exist. To the extent a cause of action can be stated without intervening in the hospital's staffing decisions or the peer review process (e.g., review of a procedural breach of a by-law procedure applicable to admitting a new member or renewing the privileges of an existing member), there should be a

limited exception for a claim which asserts a failure to adhere to established by-laws procedures. Federal and state statutory violations are also excepted.

ARGUMENT

I. MALICE, WITHIN THE CONTEXT OF THE PEER REVIEW IMMUNITY EXCEPTION, SHOULD CONTINUE TO MEAN KNOWLEDGE OF FALSITY OR A RECKLESS DISREGARD OF TRUTH OR FALSITY.

Confidentiality and immunity are integral aspects of the legislatively imposed obligations of peer review and quality assurance. It is a hospital's obligation to insure that physicians admitted to practice at the hospital are granted privileges "consistent with their individual training, experience, and other qualifications" and " are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided ...." MCL 333.21513. The review must consider "the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital." MCL 333.21513(d). Reporting obligations are also imposed, MCL 333.20175(5), but outside of those obligations, the records, data and knowledge collected in the course of the professional review process are confidential, not subject to court subpoena, and can only be used for the statutorily prescribed purposes. MCL 333.20175(8), MCL 333.21515. Further, and most importantly for this case, immunity from civil and criminal liability exists if the participants act without malice. MCL 331.531.

Physicians are willing performers in the peer review process. But physicians are also the subject of peer review investigations and proceedings. From the physicians' perspective, this intersection of interests requires the balancing of two important goals. The first goal is to assure the effectiveness of peer review proceedings by protecting participants from unfair exposure to liability. The second and sometimes competing interest is to assure that hospital staffing and privilege

decisions are administered in a fair and equitable manner. This juxtaposition of interests has been recognized by the Legislature for the State of Washington, which prefaced its immunity provision with the following "legislative finding:"

> The legislature finds the assurance of quality and cost-effectiveness in the delivery of health care can be assisted through the review of health care by health care providers. It also recognizes that some peer review decisions may be heard on factors other than competence or professional conduct. Although it finds that peer review decisions based on matters unrelated to quality and utilization review need redress, it concludes that *it is necessary to balance carefully the rights of the consuming public who benefit by peer review with the rights of those who are occasionally hurt by peer review decisions based on matters other than competence or professional conduct.*

Rev. Code Wash. (ARCW) §7.71.010 (2005)(emphasis added).

Washington's answer was to enact an exclusive remedy provision which limits redress for improperly considered matters to actions for "appropriate injunctive relief" and damages for "lost earnings directly attributable to the action taken by the professional review body." Reasonable attorneys fees and costs are also recoverable. *Rev. Code Wash. (ARCW) §7.71.030 (2005).*

In Michigan, persons and entities that engage in a peer review function are immune from liability unless the person or entity "acts with malice." MCL 331.531. Immunity is extended to members of peer review committees as well as persons providing information to peer review committees. The information must relate to the physical or psychological condition of the person; the necessity, appropriateness or quality of health care rendered to any person; or the qualifications, competence or performance of a health care provider. Acts and communications among committee members must remain within the scope of the peer review process. Michigan's immunity statute provides in pertinent part:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.

. . .

(3) A person, organization, or entity is not civilly or criminally liable:

(a) For providing information or data pursuant to subsection (1).

(b) For an act or communication within its scope as a review entity.

(c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

(4) *The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.*

MCL 331.531 (2005) (emphasis added).

The importance of immunity in the peer review process is widely recognized. All fifty states have enacted some form of peer review immunity protection. Malice or "malicious intent" is an exception in 36 states.[2] Eight states use a "good faith" standard, and intentional fraud (with or

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[2] In addition to Michigan, the states with malice exceptions include Alabama, Code of Ala. § 6-5-333 (without malice and in reasonable belief that action is warranted); Alaska, Alaska Stat. § 18.23.020 (immunity unless motivated by malice); Arkansas, A.C.A. § 20-9-502 (without malice or fraud); California, Cal Civ Code § 43.7 (without malice, reasonable effort to obtain the facts, and acts in reasonable belief that action is warranted); Connecticut, Conn. Gen. Stat. § 19a-17b (without malice, and reasonable belief that action is warranted); Georgia, O.C.G.A. § 31-7-132 (without malice for review entities and members; witnesses are immune unless the information provided is false "and the person providing it knew that such information was false"); Hawaii, HRS § 663-1.7, (without malice, but civil rights and antitrust violations are also exceptions, HRS § 671D-10, and witnesses can be liable if the information provided "is false and the person providing it knew that such information was false"); Indiana, Burns Ind. Code Ann. § 34-30-15-15, -17, and -19 (providing immunity), § 34-30-15-20 (exempting damages under any federal or state law relating to civil rights) and § 34-30-15-23 (imposing presumption of good faith and requiring proof of malice); Iowa, Iowa Code § 147.135 ("immunity from civil liability shall not apply if an act, omission, or decision is made with malice"); Kansas, K.S.A. § 65-442 (no liability and no action for damages shall arise if person or entity "acted in good faith and without malice"); Louisiana, La. R.S. 13:3715.3 (no liability if "acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him"); Maine, 24 M.R.S. § 2511 (without malice); Maryland, Md Courts and Judicial Proceedings Code Ann. § 5-628 (without malice); Minnesota, Minn. Stat. § 145.63 (no liability unless motivated by malice); Mississippi, Miss Code Ann. §41-63—5 (without malice, and reasonable belief that action is warranted); Missouri, § 537.035 R.S.Mo. (immune from civil liability for acts "performed in good faith, without malice and ... reasonably related to the scope of inquiry

without malice) is an exception in at least three states.[3] Some states have no exception to peer review immunity. For example, in Arizona, individuals and hospitals who perform peer review functions are not subject to civil damage claims.[4]

..."); Montana, Mont. Code Anno., § 37-2-201 (without malice, reasonable effort to obtain facts, reasonable belief that the action is warranted by the facts); Nebraska, R.R.S. Neb. § 71-147.01 (without malice, reasonable effort to obtain facts, reasonable belief that the action is warranted by the facts); Nevada, Nev Rev Stat Ann §439.880 (without malice); New Jersey, N.J. Stat. § 2A:84A-22.10 (without malice and with reasonable belief act is warranted); New Mexico, N.M. Stat. Ann. § 41-9-4 (without malice and with reasonable belief); New York, NY CLS Pub Health § 2805-j (without malice and with reasonable belief act is warranted; immunity from liability "shall not apply to information which is untrue and communicated with malicious intent"); North Carolina, N.C. Gen. Stat. § 90-21.22A (without malice or fraud); North Dakota, ND Cent Code § 23-34-06 (without malice, reasonable belief that action is warranted); Ohio, ORC Ann. 2305.251 (no liability for conduct within scope of function of peer review committee; no liability to one who provides information if without malice and with reasonable belief information is warranted); Pennsylvania, 63 P.S. § 425.3 (no liability for peer review if exercise due care and not motivated by malice; person providing information is not liable unless information is unrelated to duty and function of review organization or information "is false and the person providing such information knew, or had reason to believe, that such information was false"); Rhode Island, RI Gen Laws § 5-37.3-7 (without malice, reasonable belief that action is warranted); South Carolina, SC Code Ann § 40-71-10 (without malice, after reasonable effort to obtain facts, in reasonable belief that action is warranted); South Dakota, S.D. Codified Laws § 36-4-25 (without malice and has reasonable belief action is warranted); Tennessee, Tenn. Code Ann. § 63-6-219 (good faith, without malice, based on facts reasonably known or believed to exist; persons providing information are immune unless the information is false and the person had actual knowledge of its falsity); Texas, Tex. Occ. Code § 160.010 (without malice and with reasonable belief act is warranted); Utah, Utah Code Ann. § 58-13-4 (good faith and without malice); Vermont, 26 V.S.A. § 1442 (without malice and with reasonable belief that action is warranted); Virginia, Va Code Ann §8.01-581.16 (immunity unless acting "in bad faith or with malicious intent"); West Virginia, W. Va. Code § 30-3C-2 and 30-3-14 (immunity for committee members absent malice and gross negligence; person providing information is immune unless information is unrelated to the functions of the review organization or is false and person knew or had reason to believe information was false).

[3] Good faith standards appear in Colorado, C.R.S. 12-36.5-105; Delaware, 24 Del. C. § 1768 (good faith and without gross or wanton negligence); Kentucky, K.R.S. § 311.377; Massachusetts, ALM GL ch. 111 § 203; Oklahoma, 76 Okl St §25; Oregon, ORS § 441.055; Wisconsin, Wis. Stat. § 146.37; and Wyoming, Wyo. Stat. § 35-2-910. Washington exempts from immunity actions based on "matters not related to the competence or professional conduct of a health care provider." Rev. Code Wash. (ARCW) §7.71.030. Fraud is required in Florida and is an alternative exception in Arkansas and North Carolina. Fla. Stat. § 766.101; A.C.A. §20-9-502; N.C. Gen. Stat. § 90-21.22A. The immunity exception in Illinois requires "willful or wanton misconduct." 225 ILCS 60/5.

The rationale for immunity is not difficult to discern. Candor is necessary to allow individuals and organizations assigned a peer review function to effectively monitor the quality of health care and to appropriately address perceived problems. The promise of immunity allows these individuals and entities to gather internal data and to assess provider competence free from the reluctance that fear of reprisal engenders.

The Michigan Court of Appeals recognized in *Long v Chelsea Community Hospital,* 219 Mich App 578, 584; 557 NW2d 157 (1996)(Young, P.J. and Corrigan and M.J. Callahan, JJ.), that the immunity "statute's implicit purpose is to protect the participants in the peer review process." The Arizona Court of Appeals made a similar observation in *Samaritan Health System v Superior*

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[4] Arizona at one time enacted a malice exception to immunity but the statute has since been amended to eliminate the exception and now provides:

> A. Any individual who, in connection with duties or functions of a hospital or outpatient surgical center pursuant to *section 36-445,* makes a decision or recommendation as a member, agent or employee of the medical or administrative staff of a hospital or center or of one of its review committees or related organizations or who furnishes any records, information, or assistance to such medical staff or review committee or related organization is not subject to liability for civil damages or legal action in consequence thereof.
>
> B. No hospital or outpatient surgical center and no individual involved in carrying out review or disciplinary duties or functions of a hospital or center pursuant to *section 36-445* may be liable in damages to any person who is denied the privilege to practice in a hospital or center or whose privileges are suspended, limited or revoked. The only legal action which may be maintained by a licensed health care provider based on the performance or nonperformance of such duties and functions is an action for injunctive relief seeking to correct an erroneous decision or procedure. The review shall be limited to a review of the record. If the record shows that the denial, revocation, limitation or suspension of membership or privileges is supported by substantial evidence, no injunction shall issue. In such actions, the prevailing party shall be awarded taxable costs, but no other monetary relief shall be awarded.
>
> C. Nothing in this section relieves any individual, hospital or outpatient surgical center from liability arising from treatment of a patient.

Court, 981 P2d 584, 589 n.8 (Ariz. 1998), stating that "[t]he legislature granted ... statutory immunity because peer review is critical to promoting better patient care" and it is *"intended to ensure that peer review is more than cursory, 'encouraging full and frank discussions and decision making' through a process that can be both time consuming and contentious* (citation omitted)(emphasis added)." The Tennessee legislature made this purpose explicit, stating:

> (1) ... [I]t is the stated policy of Tennessee to encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence, and ability to practice medicine. Tennessee further recognizes that confidentiality is essential both to effective functioning of these peer review committees and to continued improvement in the care and treatment of patients.
>
> (2) *As incentive for the medical profession to undertake professional review, including the review of health care costs, peer review committees must be protected from liability for their good-faith efforts. To this end, peer review committees should be granted certain immunities relating to their actions undertaken as part of their responsibility to review, discipline, and educate the profession.* In instances of peer review committees examining the appropriateness of physicians' fees, this immunity must also extend to restraint of trade claims ...

Tenn. Code Ann. § 63-6-219 (emphasis added). *See also,* 225 ILCS 60/5, wherein the Illinois legislature prefaced its grant of immunity with the recognition that "the candid and conscientious evaluation of clinical practices is essential to the provision of adequate health care," and that "the policy of this State [is] to encourage peer review by health care providers."

With this peer review purpose in mind, the Court of Appeals in *Long* concluded that recognizing a private cause of action for malice under the statute "would frustrate and undermine the legislative purpose of providing immunity," adding:

A.R.S. § 36-445.02 (2006). Peer immunity statutes in Idaho and New Hampshire have no apparent exceptions. Idaho Code § 39-1392c, *RSA § 151:13a.*

> The Legislature plainly did not intend to create a private cause of action. Its intent to confer certain immunities would be frustrated if this Court distorted its careful choice of language by recognizing a private cause of action for malice.

219 Mich App at 584.

This Court has also reaffirmed the need to preserve the integrity of the peer review process, although in the confidentiality context. In *Attorney General v Bruce,* 422 Mich 157; 369 NW2d 826 (1985), this Court rejected the Attorney General's attempt to subpoena, on behalf of the Department of Licensing and Regulation and the Michigan Board of Medicine, a hospital's peer review committee proceedings. This Court recognized the obligation imposed upon hospitals by the Public Health Code to review their professional practices and procedures, MCL 333.1101 et seq., and observed that "to encourage and implement productive peer review procedures, the Legislature has provided that the information and records developed and compiled by peer review committees be confidential and not subject to court subpoena." *Id.* at 161. MCL 333.20175(5) and MCL 333.21515. In enacting these provisions, this Court said, "the Legislature provided a strong incentive for hospitals to carry out their statutory duties." *Id.* at 169-170.

Similarly in *Dorris v Detroit Osteopathic Hospital Corp,* 460 Mich 26; 594 NW2d 455 (1999), this Court held that the trial court erred in requiring the disclosure of a hospital incident report and other investigative documents relating to an assault upon one patient by another. This Court reasoned:

> Hospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by §§ 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished. This will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality.

460 Mich at 42-43.

This Court's observation in *Dorris* applies equally to immunity. Until now, the sole exception to immunity provided by MCL 331.531 – malice – was narrowly construed and confined to instances where actions were taken or information was provided with knowledge of falsity or with a reckless disregard of truth or falsity. *See, Veldhuis v Allan,* 164 Mich App 131, 136-137; 416 NW2d 347 (1987). With the *Feyz* decision, the Court of Appeals has inexplicably defined malice to mean "a state of mind which is reckless of law and the legal rights of the citizen," and has widened the exception to include, at a minimum, all civil rights violations and allegations of discrimination.

Veldhuis involved the termination of the hospital privileges of a physician who had been a member of the medical staff for nearly 20 years. Plaintiff invoked the malice exception in response to defendants' assertion of immunity. The Court looked to the definition of malice applied in defamation cases and held there was no evidentiary support for the allegation. The Court explained:

> We agree with defendant Davis Clinic that the definition of malice applicable in defamation actions also seems appropriate in the context of *MCL 331.531; MSA 14.57(21).* See *Regualos v Community Hospital, 140 Mich App 455, 463; 364 NW2d 723 (1985),* lv den *423 Mich 861 (1985),* citing *Lins v Evening News Ass'n, 129 Mich App 419; 342 NW2d 573 (1983).* Applying that definition, the statutory immunity does not apply only if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity. *129 Mich App 432.* Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts.[5]
>
> In this case, plaintiff presented no evidentiary support for his allegations of malice. In contrast to the voluminous evidence supporting defendants' claims that their actions were based on numerous instances of serious deficiencies in plaintiff's medical judgment, plaintiff offered only speculation concerning defendants' alleged nefarious motives. There was no evidence that false information was ever knowingly presented or that defendants acted in reckless disregard of the truth or falsity of the information which they presented or upon which they relied.

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[5] *Regualos* held that plaintiff had not "submitted clear and convincing proof necessary to establish a genuine issue of material fact concerning the existence of actual malice." 140 Mich App at 463.

164 Mich App at 136-137 (footnote added).

The same definition was applied by the District Court for the Eastern District of Michigan in *Savas v William Beaumont Hospital,* 216 F Supp 2d 660 (ED Mich 2002), and by the Court of Appeals in *Warner v Henry Ford Hospital,* 1996 Mich App LEXIS 2078 (1996) (Saad, P.J., and Corrigan and R.A. Benson, JJ.), *Holloman v London,* Ct App Dkt No. 227422 (Griffin, P.J., and Holbrook, Jr. and Hoekstra, JJ.)(February 22, 2002), and *Ravikant v William Beaumont Hospital,* 2003 Mich App LEXIS 2477 (2003) (Whitbeck, C.J., and Talbot and Zahra, JJ.).[6] Quoting the definition of malice adopted by the Court of Appeals in *Veldhuis,* the District Court in *Savas* found that the complaint did not allege knowledge of falsity or a reckless disregard of the truth. 216 F Supp at 669. On that same basis, the *Warner* Court concluded that "reasonable minds would not be justified in concluding that defendant acted with malice:"

> [T]he letters do not provide factual support for plaintiff's claim that the statements concerning her participation in the psychiatry rotation were false or were made with reckless disregard of their truth or falsity.

Warner at 3. Also relying on the *Veldhuis* definition, the *Holloman* court observed that "[a]lthough plaintiff uses the word 'malice' and makes the conclusion that defendant acted maliciously, he does not provide factual allegations showing malice." *Holloman* at 2. The *Ravikant* Court reached the same conclusion:

> Here, plaintiff offered no evidence that defendant acted with actual malice, i.e., with knowledge of the report's falsity or with reckless disregard of its truth or falsity, when reporting plaintiff's limitation of staff privileges. *Id.* Even if plaintiff did not agree with the conclusion reached by defendant, defendant factually reported the result of the investigation leading to the reduction of plaintiff's privileges.

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[6] MSMS recognizes that *Warner*, *Holloman*, and *Ravikant* are unpublished decisions and are not precedential. They are merely referenced to illustrate the precedential value which the Court of Appeals has accorded to *Veldhuis* and *Regualos*. *Warner, Holloman*, and *Ravikant* are collectively attached as Exhibit A.

Ravikant at 8.

The Court of Appeals' departure from this accepted definition of malice is an enigma. The majority (Sawyer and Smolenski, JJ.) concluded that peer review immunity did not apply to claims asserted under the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq.*; the Americans With Disabilities Act, 42 USC 12101 *et seq.*; the federal civil rights acts, 42 USC 1983 and 1985; or the Vocational Rehabilitation Act, 29 USC 794 because "[i]t is not within the scope of a peer review committee to violate someone's civil rights" [7] and "a violation of a civil rights act" is "a malicious act." As to the later basis, the majority explained:

> The following portion of the definition of "malice" from Black's Law Dictionary (5th ed) is particularly apt in this situation: "Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen." The various civil rights acts adopted by the state Legislature and the United States Congress establish the legal rights of the citizens, including plaintiff. If defendants acted in disregard of those rights, doing so represents a malicious act and, therefore, is outside the scope of immunity granted by the peer review statute.

Feyz, 264 Mich App at 704-05.[8] Inexplicably, the Court neither considered nor distinguished its prior decisions in *Veldhuis v Allan* or *Regualos v Community Hospital.*

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[7] Judge Murray disagreed with the rationale that it is not within the scope of a peer review committee to violate someone's civil rights. Judge Murray properly observed that:

> In determining whether an act or communication is within the scope of a review committee, we cannot examine the legal result of the act or communication; instead, we must focus on the subject matter on which the initial act or communication complained of was made, i.e., the decision not to retain a physician, to suspend a physician, etc. . . . Otherwise, every time there is a potential for legal liability, there would be no immunity, which would defeat the purposes of the statute.

264 Mich App at 726.

[8] It appears that the majority found that immunity applied with respect to Plaintiff's claims for invasion of privacy, breach of fiduciary and public duties, and breach of contract except insofar as the alleged actions were taken by the Executive Committee of Defendant Hospital which, in the Court's view, was not a peer review committee under MCL 331.531.

In an opinion concurring in part and dissenting in part, Judge Murray agreed that an unlawful act of discrimination constitutes malice but noted that the majority overlooked the definition of malice applied by the Court in *Veldhuis* and *Regualos*. Judge Murray observed that there was no discussion in either case as to *why* the defamation definition of malice applied but concluded that "since that definition has been adopted and utilized in both our published and unpublished decisions, as well as by the federal courts applying Michigan law, we must, at minimum, apply that definition. If we do not, we must explain why." 264 Mich App at 727.

Judge Murray observed that the foundation of the discrimination claims in *Feyz* was the allegation that defendants referred plaintiff to the Health Professional Recovery Program (HPRP) with full knowledge that he had no mental or physical limitations. This allegation, Judge Murray, concluded, "fits within the definition of malice as articulated in *Veldhuis*." Judge Murray explained:

> In other words, plaintiff's claim alleges that the Executive Committee sent him to the HPRP with knowledge that plaintiff had no impairment that qualified him for a referral or was reckless in disregarding that information when acting. This allegation falls squarely within the term "malice" as defined in *Veldhuis*.

Id. at 728. Other civil rights allegations would also fall within the definition of malice, Judge Murray concluded, quoting Black's Law Dictionary (7th ed) and defining legal malice as "[t]he intent, without justification or excuse, to commit a wrongful act:"

> As counsel acknowledged during oral argument, discrimination claims may fall within the legal definition of malice because of the falsity (or, in discrimination terms, pretext) of the offered reasons for an act. It is also true that discrimination generally must be intentional to be actionable. (citation omitted) Finally, through the state's civil rights acts, the Legislature has specifically authorized these claims to be brought against hospitals and their employees. Thus, the immunity under MCL 331.531 would not bar otherwise valid discrimination claims. (citations omitted).

264 Mich App at 728.

These varying definitions of malice - a "state of mind which is reckless of law and of the legal rights of the citizen" (*Feyz* majority) and "the intent without justification or excuse, to commit

a wrongful act" (Judge Murray), as well as the per se exception for civil rights and discrimination actions, expand the scope of the immunity exception expressed by the Legislature. Indeed, these definitions invoke a criminal context. *See e.g., People v Holtschlag,* 471 Mich 1, 6, n3; 684 NW2d 730 (2004), where this Court quoted Black's Law Dictionary (7th ed) to define malice in a felony murder/involuntary manslaughter case, i.e., "'Malice' is defined as: '1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart.'"

An allegedly wrongful act that occurs in the context of a peer review proceeding is more analogous to a defamation action than to a criminal murder prosecution. Thus, the definition of malice in defamation actions is more appropriately applied to the peer review immunity exception than is the definition of malice in the criminal context. With respect to defamation, this Court has said that actual malice exists "when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth." *J&J Construction Co v Bricklayers and Allied Craftsmen,* 468 Mich 722, 731; 664 NW2d 728 (2003). This is the formulation applied by the Court of Appeals in *Veldhuis* and *Regualos.*

Further, if the Legislature intended to create an exception for *every* alleged act of discrimination or civil rights violation, it could have crafted the exception to explicitly include the claims, as did the Legislatures in Hawaii and Indiana. *See,* Hawaii, HRS § 663-1.7 (malice exception) and HRS § 671D-10 (exception for civil rights violations); Indiana, *Burns Ind. Code Ann. § 34-30-15-23* (malice exception) and *§ 34-30-15-20* (exception for civil rights violations). *See also,* Health Care Quality Improvement Act. 42 USC § 11111(a)(1)(D), which excepts civil rights claims from the grant of immunity. Under the law as it presently exists in Michigan, malice cannot

be implied in every alleged act of discrimination. Claims of disparate impact or those asserting a failure to accommodate need not be malicious.

Nearly any cause of action can be made to fit within the broad definitions of malice articulated in *Feyz*. Other states have resisted such attempts to widen the malice exception to immunity. For example, in *Chada v Shimelman,* 75 Conn App 819; 818 A2d 789 (2002), plaintiff psychiatrist appealed the grant of summary judgment as to claims arising out of the suspension of his license to practice medicine, asserting that the Court had improperly applied the definition of "actual malice" used for defamation actions, when it should have instead applied a general definition of malice or malice in law.[9] The appellate court disagreed. Construing the malice exception in the Connecticut peer review immunity statute, Conn. Gen. Stat. § 19a-20, the Court explained:

> Although *§ 19a-20* does not define "malice," our Supreme Court has held that the malice required to overcome a qualified privilege in defamation cases is malice in fact or actual malice ... We can perceive no reason, and the plaintiff has provided us with none, to apply a different definition of malice in the context of *§ 19a-20.* We therefore conclude that the court correctly determined that the malice required by *§ 19a-20* is actual malice. . . .
>
> "Actual malice requires that the statement, when made, be made with actual knowledge that it was false or with reckless disregard of whether it was false ... A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth." (Citations omitted; internal quotation marks omitted in original).

818 A2d 826-827.

A similar construction was given to the term "malice" in the Texas peer review immunity statute. Tex. Occ. Code § 160.010. Interpreting the malice exception in the context of an action

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[9] Plaintiff also alleged that the Court improperly determined that plaintiff failed to present a factual predicate for the allegation that defendants acted with malice, and improperly decided the issue of malice on summary judgment. 818 A2d at 821.

arising from a hospital medical peer review process, the Texas Court of Appeals said in *Maewal v Adventist Health Systems/Sunbelt, Inc*, 868 SW 2d 886, 893 (Tex Ct App 1993):

> The peer review process is analogous to an employer's performance assessment of an employee or an employer's investigation into an employee's alleged wrongdoing. Accordingly, we hold a presumption of absence of malice applies to medical peer review committee actions. We further hold the meaning of malice as used in article 4495b to mean knowledge that an allegation is false or with reckless disregard for whether the allegation is false.[10]

See also, Leyba v Renger, 874 F Supp 1218, 1224 (D. N.M. 1994) (to establish malice, plaintiff must show that defendant's statements were made with knowledge that they were false or with reckless disregard of whether they were false).

The *Feyz* Court's departure from prior law is unwarranted and will impede the Legislature's purpose of ensuring effective peer review. This departure portends grave consequences for peer review participants, not the least of which is the potential dismantling of the cloak of immunity and the effectiveness of the quality assurance procedure. As before, this Court should firmly protect the integrity of the peer review process by rejecting this encroachment on the promise of immunity.

II. TO THE EXTENT A CAUSE OF ACTION CAN BE STATED WITHOUT INTERVENING IN STAFF PRIVILEGE DECISIONS OR THE PEER REVIEW PROCESS, THERE SHOULD BE A LIMITED EXCEPTION TO THE JUDICIAL NON-REVIEWABILITY DOCTRINE FOR BREACH OF ESTABLISHED BY-LAWS PROCEDURES.

The doctrine of judicial non-reviewability of medical staff privilege decisions reflects the Legislature's delegation of authority over such matters to hospitals[11] and the judiciary's recognition that courts are ill-equipped to review such decisions. This means that, contrary to the majority

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[10] An earlier version of the statute was at issue in *Maewal.*

[11] *See* MCL 333.21513, which states in part: "The owner, operator, and governing body of a hospital licensed under this article: (a) Are responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital."

opinion in *Feyz,* private hospitals are not "subject to the same breach of contract claims as any other private corporation." *Feyz,* 264 Mich App at 724.[12]

Presently, it is not clear whether an alleged breach of contract – based on the medical staff by-laws – states a cognizable claim. Whether medical staff by-laws constitute an enforceable contract remains an open question in Michigan. The issue was last addressed at the appellate level in *Macomb Hospital Center Medical Staff v Detroit-Macomb Hospital Corp,* 1996 Mich App LEXIS 1680 (1996), in which the Court of Appeals stated that medical staff bylaws do not constitute a binding contract. As an unpublished opinion, *Macomb Hospital* is not precedent; however, it was cited by a magistrate judge in *Jeung v McKrow*, 2003 US Dist LEXIS 15994 at *48 (ED Mich, February 28, 2003), for the proposition that medical staff bylaws do not create an enforceable contract.[13] The District Court rejected the magistrate's reliance upon an unpublished decision and opined that state courts are likely better situated to determine these claims. *Jeung v McKrow*, 264 F Supp 2d 557, 572 (ED Mich 2003).

Irrespective of whether a breach of contract claim can be based on the medical staff by-laws, there is some authority for the proposition that a limited exception to the judicial non-reviewability doctrine exists, which would allow courts to review a medical staff's failure to adhere to those procedures contained in its by-laws. *See e.g., Long v Chelsea Community Hospital,* 219 Mich App 578, 588; 557 NW2d 157 (1996)("Plaintiff next argues that his circumstances fall within the exception outlined in *Sarin:* 'There may be some situations where a court should be able to consider

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[12] The *Feyz* majority held that the judicial non-review doctrine did not bar Plaintiff's civil rights claims, the invasion of privacy claim, or the breach of contract claim, but did bar the claim for breach of fiduciary and public duties. Judge Murray agreed that the judicial non-review doctrine barred the breach of fiduciary and public duties claim but would also have dismissed the claims for invasion of privacy and breach of contract on that basis.

a hospital's action without violating the principle of non-reviewability ...' *Id.* Because plaintiff failed to provide a copy of the bylaws ... this Court has no way of reviewing whether the exception applies ...").

The Court of Appeals recognized in *Sarin v Samaritan Health Center*, 176 Mich App 790, 795; 440 NW2d 80 (1989), that a claim should not be reviewed if it will "interven[e] in the hospital's decision and interfere[e] with the peer review process." This limitation is the essence of the judicial non-reviewability doctrine and precludes the review of any claim that challenges a decision awarding, denying, suspending or withdrawing medical staff privileges. However, it would not preclude consideration of an alleged failure to follow by-laws procedures in rendering the decision. Courts have also recognized an exception to judicial non-reviewability for claims which allege a violation of state and federal statutes. *Long,* 219 Mich App at 587.

For example, if a hospital's peer review committee decides to remove a physician from the medical staff without following the procedures contained in the medical staff by-laws, neither peer review immunity nor the judicial non-reviewability doctrine should prevent the physician from seeking injunctive relief relative to the failure to comply with the by-laws procedures. This would not contravene the peer review immunity statute because immunity protects against civil and criminal liability; it does not expressly preclude an action for injunctive relief. While the court, in entertaining such a claim, could not review the propriety of the hospital's decision (or substitute its judgment regarding the staffing issue for that of the committee's), the hospital could be compelled to follow its by-laws procedures in reaching the decision.

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[13] These two unpublished opinions are collectively attached as Exhibit B.

CONCLUSION AND RELIEF REQUESTED

Amicus *Curiae* Michigan State Medical Society therefore respectfully requests that this Honorable Court reaffirm the definition of malice which was adopted by the Court of Appeals in *Veldhuis* and *Regualos*, and confirm the existence of a limited exception to the judicial non-reviewability doctrine for a failure to adhere to procedures established in the by-laws for consideration of staff privileges decisions if the claim will not "interven[e] in the hospital's decision" or "interfere[e] with the peer review process."

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Dated: April 12, 2006

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STEPHANIE WARNER, M.D., Plaintiff-Appellant, v HENRY FORD HOSPITAL, Defendant-Appellee.

No. 177995

COURT OF APPEALS OF MICHIGAN

1996 Mich. App. LEXIS 2078

October 4, 1996, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: LC No. 93-333197-CZ.

DISPOSITION: Affirmed.

JUDGES: Before: Saad, P.J., and Corrigan and R.A. Benson, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINION: PER CURIAM.

In this defamation action, plaintiff appeals by right the order granting summary disposition to defendant under *MCR 2.116(C)(10)*. We affirm.

Plaintiff Stephanie Warner participated in defendant Henry Ford Hospital's residency program from July 1989 until February 1990, when she resigned. She subsequently completed her residency at another hospital and eventually obtained a medical license in Michigan. In 1993, plaintiff applied for a medical license in Florida. As part of the application process, the Florida Board of Medicine sent defendant a request for information regarding plaintiff. Defendant responded to that request. Plaintiff subsequently commenced the present action, alleging that defendant defamed her in its response to the request for information. Defendant moved for summary disposition, which the court granted. Plaintiff appeals. [*2]

Contrary to plaintiff's assertion on appeal, the record does not indicate that the trial court granted summary disposition because it concluded that the alleged defamatory statements "were merely opinions" and, therefore, not actionable. Rather, the record indicates that the trial court granted summary disposition because the submitted documents did not create a genuine issue of material fact regarding malice. We find no error.

A motion under *MCR 2.116(C)(10)* tests the factual basis underlying a claim. *Radtke v Everett, 442 Mich. 368, 374; 501 N.W.2d 155 (1993)*. In ruling on such a motion, the trial court must consider not only the pleadings but also any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Id.* The court must give the benefit of any reasonable doubt to the opposing party and may grant the motion only if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*

MCL 331.531; MSA 14.57(21) states, in pertinent part:

> (1) A person, organization, or entity may provide to a review entity information or data relating [*3] to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, *or the qualifications, competence, or performance of a health care provider.*
>
> * * *
>
> (3) A person, organization, or entity is not civilly or criminally liable:
>
> (a) For providing information or data pursuant to subsection (1).
>
> * * *
>
> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice. [Emphasis added.]

Thus, a person, organization or entity that provides infor-

mation to a review entity pursuant to subsection (1) is immune from civil liability unless the person, organization or entity acts with malice. *Regualos v Community Hospital, 140 Mich. App. 455, 462; 364 N.W.2d 723 (1985).*

In this case, defendant furnished the information to the Florida Board of Medicine because plaintiff applied for a medical license. The statute defines "review entity" to include "[a] state department or agency whose jurisdiction encompasses the information described in subsection (1)." *MCL 331.531(2)(d)*; MSA 14.57(21). [*4] This definition encompasses the Florida Board of Medicine with respect to information pertaining to an application for a medical license. Accordingly, unless defendant acted with malice, it is immune from liability regarding information it provided pursuant to subsection (1) of the statute.

We reject plaintiff's claim that the trial court erred in finding that no genuine issue of material fact existed regarding malice. In *Veldhuis v Allan, 164 Mich. App. 131, 136; 416 N.W.2d 347 (1987),* this Court stated:

> The definition of malice applicable in defamation actions also seems appropriate in the context of *MCL 331.531*; MSA 14.57(21). . . . Applying that definition, the statutory immunity does not apply only if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity. [Citations omitted.]

In the present case, defendant submitted numerous memoranda, letters, departmental communications, correspondence, and other documents from plaintiff's file that support the various statements contained in defendant's response to the Florida Board of Medicine's request [*5] for information. A review of the submitted documents reveals that reasonable minds would not be justified in concluding that defendant acted with malice.

We reject plaintiff's contention that additional documents in her file create a genuine issue of fact regarding the existence of malice. Specifically, the Florida Board of Medicine's letter of inquiry and defendant's response both reference plaintiff's participation in defendant's psychiatry residency program. Neither the February 14, 1990, nor the May 31, 1990, letters of reference relied upon by plaintiff relate to her performance in the psychiatry rotation. Rather, the letters address plaintiff's performance in the general internal medicine and neurology rotations. Accordingly, the letters do not provide factual support for plaintiff's claim that the statements concerning her participation in the psychiatry rotation were false or were made with reckless disregard of their truth or falsity. Additionally, plaintiff's reliance on the February 23, 1990, letter from Dr. Selbst is misplaced. That letter does not discuss the plaintiff's employment status when she resigned from the residency program. Thus, it fails to establish an issue [*6] of fact regarding the existence of malice with respect to defendant's statement that plaintiff "did not leave in good standing." Likewise, the February 13, 1990, departmental communication from Dr. Davis merely addresses plaintiff's then-existing suspension and the steps necessary for that suspension to be lifted. Contrary to plaintiff's representation, the document does not indicate that defendant would have offered plaintiff a position in the residency program the following year. Nor do any of the other documents that plaintiff submitted support a finding that defendant acted with malice when responding to the Florida Board of Medicine's request for information.

Apart from the issue of malice, plaintiff argues that summary disposition was improper because a question of fact exists whether defendant, in responding to the request for information, exceeded the scope of any personal consent that plaintiff provided for the release of information, thereby defeating defendant's claim of privilege. Plaintiff's argument, however, assumes that "defendant relies on a general release of information to conclude they have a privilege." As the prior discussion indicates, defendant's claim of privilege [*7] is not grounded solely on the existence of a general release; it is also grounded in *MCL 331.531*; MSA 14.57(21), which does not require consent. Rather, the privilege applies if the information relates to "the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider." *MCL 331.531(1)*; MSA 14.57(21)(1). Here, each of the statements relate to plaintiff's qualifications, competence or performance as a health care provider. The statements are subject to the statutory privilege, notwithstanding the alleged absence of consent regarding the release of the information. Accordingly, the trial court granted summary disposition correctly in favor of defendant under *MCR 2.116(C)(10).*

Affirmed.

/s/ Henry William Saad

/s/ Maura D. Corrigan

/S/ Robert A. Benson

STATE OF MICHIGAN

COURT OF APPEALS

JOHN HOLLOMAN, M.D.,

Plaintiff-Appellant,

v

JOHN LONDON, M.D., and KELSEY MEMORIAL HOSPITAL, INC.,

Defendants-Appellees.

UNPUBLISHED
February 22, 2002

No. 227422
Montcalm Circuit Court
LC No. 99-000826-NZ

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff first argues that Michigan's doctrine of nonreviewability of private hospital staffing decisions is limited to contract claims, and thus the trial court erred in granting summary disposition on his tortious interference claims. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In *Hoffman v Garden City Hospital-Osteopathic*, 115 Mich App 773, 778-779; 321 NW2d 810 (1982), this Court adopted the majority viewpoint that a private hospital has the power to appoint and remove members of the staff at will without judicial intervention. See also *Long v Chelsea Community Hospital*, 219 Mich App 578; 557 NW2d 157 (1996); *Sarin v Samaritan Health Center*, 176 Mich App 790; 440 NW2d 80 (1989). In support of his position that this nonreviewability doctrine does not apply to tort actions, plaintiff relies on dicta in *Long, supra* at 586-587. Although this Court has stated that not all claims are barred by the doctrine of nonreviewability, *Long, supra*; *Sarin, supra* at 795, plaintiff presents no persuasive argument why the present case is of that sort.[1] Plaintiff's tort claims would necessarily invoke a review of

[1] See *Samuel v Herrick Memorial Hospital*, 201 F3d 830, 835 (CA 6, 2000) (the district court "was without jurisdiction to review plaintiff's claim of tortious interference with contractual relations and business relationships, as are we, because it would necessarily involve a review of the decision to suspend plaintiff and the methods or reasons behind that action, which is clearly prohibited under Michigan law as improper interference with the hospital's decisions and the (continued...)

the hospital's staffing decision, and thus review of such claims is barred because it would intervene in the hospital's decisions and would interfere with the peer review process. *Long, supra* at 588; *Sarin, supra* at 794.

Regardless, in order to survive a motion for summary disposition, plaintiff had to allege facts justifying the application of an exception to immunity. See *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001) ("To survive . . . a motion [under MCR 2.116(C)(7)], the plaintiff must allege facts justifying the application of an exception to governmental immunity."). Although plaintiff argues that by claiming malice, he pleaded in avoidance of immunity under MCL 331.531, his pleadings are insufficient, and he offered no evidence in support of his claim, arguing rather that this claim would be developed through discovery. See *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) ("A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence."). MCL 331.531 offers immunity to persons or entities for their actions involving the peer review process. *Long, supra* at 584. However, the immunity afforded in MCL 331.531(3) may be avoided if the person or entity acts with malice. MCL 331.531(4). "[T]he statutory immunity does not apply only if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity." *Veldhuis v Allan*, 164 Mich App 131, 136; 416 NW2d 347 (1987). Although plaintiff uses the word "malice" and makes the conclusion that defendant acted maliciously, he does not provide factual allegations showing malice. *Veldhuis, supra* at 136-137; see *Fane, supra*; Cf *Regualos v Community Hospital*, 140 Mich App 455, 462-463; 364 NW2d 723 (1985). Thus, summary disposition was proper.[2]

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra

(...continued)

peer review process").

[2] To the extent that plaintiff argues that his complaint states a cause of action under the Michigan Antitrust Reform Act, MCL 445.771 *et seq.*, we decline to reach this issue because plaintiff cites no law in support of his position, *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116; 593 NW2d 595 (1999), and because plaintiff conceded at oral argument that if defendants have immunity, that immunity applies to his entire cause of action. Under these circumstances, we need not address plaintiff's final argument.

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THAMMADI RAVIKANT, Plaintiff-Appellant, v WILLIAM BEAUMONT HOSPITAL, Defendant-Appellee.

No. 238911

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 2477

September 30, 2003, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 01-033117-CK.

DISPOSITION: Affirmed.

JUDGES: Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

OPINION: PER CURIAM.

In this employment discrimination case, plaintiff filed a ten-count complaint against defendant relating to defendant's restriction of plaintiff's staff privileges. The trial court granted summary disposition to defendant of all plaintiff's claims. Plaintiff now appeals as of right. We affirm.

Plaintiff is a physician of East Indian descent licensed to practice medicine in Michigan. At the time of the adverse employment action in this case, plaintiff was about sixty years old and had been granted staff privileges at defendant hospital for the past twenty years. After the death of one of plaintiff's surgical patients, defendant conducted an extensive investigation and peer review, which resulted in the restriction of plaintiff's staff privileges. Plaintiff, thereafter, brought the present suit against defendant. Plaintiff's amended complaint alleged ten counts, including: Count I, racial [*2] discrimination in violation of *MCL 37.2201(a)*; Count II, denial of public accommodation on the basis of race in violation of *MCL 37.2302(a)*; Count III, racial discrimination in violation of *MCL 333.21513(e)*; Count IV, racial discrimination in violation of the United States and Michigan constitutions; Count V, age discrimination in *MCL 37.2201(a)*; Count VI, denial of public accommodation on the basis of age in violation of *MCL 37.2302(a)*; Count VII, age discrimination in violation of *MCL 333.21513(e)*; Count VIII, age discrimination in violation of the United States and Michigan constitutions; Count IX, detrimental reliance; and Count X, defamation.

Defendant thereafter filed a motion for summary disposition, pursuant to *MCR 2.116(C)(8)* and (C)(10), requesting dismissal of all plaintiff's claims on the grounds that (1) plaintiff was not defendant's employee, and thus, lacked standing to assert discrimination claims under the Civil Rights Act (CRA), *MCL 37.2101 et seq.*, (2) the doctrine of judicial [*3] non-review of private hospital staffing decisions precluded plaintiff's tort claims of promissory estoppel and defamation, (3) plaintiff expressly released defendant from liability arising from professional review and corrective actions, (4) MCL 333.531 provides defendant immunity for peer review actions, (5) the right to practice medicine is not a service offered to the general public, so plaintiff's claims of denial of public accommodation fail, (6) the Public Health Code does not provide plaintiff a private cause of action, and (7) no private right of action exists for constitutional violations under the circumstances of this case and plaintiff has not alleged that defendant acted under the color of state law. Plaintiff responded, arguing that (1) summary disposition was premature at that time because discovery had not yet occurred, (2) plaintiff was not required to be defendant's employee to have a cause of action under the CRA, (3) plaintiff actually was defendant's employee under the economic reality test, (4) defendant was a public accommodation who discriminated against plaintiff, and (5) plaintiff's common law claims, which were non-contractual, were [*4] justiciable.

After oral arguments on the motion, the trial court granted defendant summary disposition and dismissed plaintiff's complaint with prejudice. In an oral opinion, the trial court found that (1) under the economic reality test, plaintiff was not defendant's employee and had no standing to proceed under the CRA, (2) the doctrine of

judicial non-review precluded plaintiff's tort claims, (3) plaintiff failed to allege that defendant denied him access to a service available to the public, and therefore, the public accommodation counts failed as a matter of law, (4) the Public Health Code did not provide a private right of action, and (5) Michigan courts "decline to recognize a cause of action for money damages or other compensatory relief for past violations of the Equal Protection Clause of the Michigan Constitution, because the constitution provided the legislature the authority to create remedial measures to address civil rights violation."

Plaintiff now appeals, arguing that the trial court erred in granting defendant summary disposition. A trial court's decision to grant or deny summary disposition is reviewed de novo. *MacDonald v PKT Inc, 464 Mich. 322, 332;* [*5] *628 N.W.2d 33 (2001).* A motion for summary disposition pursuant to *MCR 2.116(C)(10)* tests the factual support of a claim. *Id.* In reviewing the motion, the trial court considers all affidavits, together with the pleadings, depositions, admissions, and documentary evidence submitted by the parties, in a light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co, 460 Mich. 446, 454; 597 N.W.2d 28 (1999).* The trial court should grant the motion if the evidence demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *MacDonald, supra.*

At the outset, we note that as a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable, 240 Mich. App. 553, 566; 618 N.W.2d 23 (2000)*(citation omitted). However, summary disposition may be proper before the completion of discovery where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.*

Plaintiff first argues that he [*6] stated a claim under the CRA, regardless of whether he is defendant's employee, because the CRA states that "individuals," and not just employees, are protected from discrimination by any "person who has one or more employees." *MCL 37.2201.* n1 We disagree. This Court has recognized that an employment relationship is required in order for a plaintiff to state a claim under the CRA. See *Ashker v Ford Motor Co, 245 Mich. App. 9, 15; 627 N.W.2d 1 (2001)* (reaffirming the use of the economic reality test to determine whether a plaintiff could be considered an employee of the defendant for purposes of an CRA claim); *Seabrook v Michigan Nat'l Corp, 206 Mich. App. 314, 316; 520 N.W.2d 650 (1994)* (holding that the plaintiff could not bring an action under the CRA because she failed to establish an employer-employee relationship with the defendant corporation).

n1 *MCL 37.2201* provides, in part: As used in this article: * * *

(a) "Employer" means a person who has 1 or more employees, and includes an agent of that person.

[*7]

However, plaintiff contends that this Court should apply the reasoning in *Chiles v Machine Shop, Inc, 238 Mich. App. 462, 468; 606 N.W.2d 398 (1999),* which provides that an actual employment relationship is not necessary to have standing to sue under the Persons With Disabilities Civil Rights Act (PWDCRA), *MCL 37.1101 et seq.*, as long as the defendant is in a position to "affect adversely the terms and conditions of an individual's employment or potential employment," to this case. Even if this Court applied the reasoning in *Chiles, supra,* plaintiff's CRA claims cannot be maintained because plaintiff offered no evidence that defendant was in a position to affect plaintiff's employment with his acknowledged employer, Sarala Ravikant, M.D., P.C. Further, defendant presented evidence that plaintiff still holds staff privileges with defendant and also had staff privileges at other hospitals in Pontiac when plaintiff reapplied for staff privileges with defendant. Although plaintiff's staff privileges with defendant have been limited, plaintiff did not present evidence that this limitation adversely affected his employment. [*8]

Alternatively, plaintiff argues that under the economic reality test, he is in fact defendant's employee, and thus, he has standing to sue defendant under the CRA. We disagree. Whether a company is a particular worker's employer is a question of law for the court to decide if the evidence on the matter is reasonably susceptible of a single inference. "Only where the evidence bearing on the company's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide." *Derigiotis v J M Feighery Co, 185 Mich. App. 90, 94; 460 N.W.2d 235 (1990)* (addressing the issue in the context of the workers' compensation act).

Michigan courts use the economic reality test to determine whether defendant was plaintiff's employer. The factors to be considered in applying the economic reality test are (1) control; (2) payment of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline. *Ashker, supra at 12.*

In this case, plaintiff admitted to being an employee of Sarala Ravikant, M.D., P.C. Plaintiff further stated that he did not have a formal written employment [*9] contract with defendant. Defendant's Senior Vice-President

and Medical Director stated in his affidavit that defendant (1) did not direct the manner in which plaintiff rendered medical care to his patients, (2) did not pay plaintiff for his services, (3) did not pay plaintiff's licensing fees, professional dues, insurance, taxes, or retirement benefits, (4) did not bill plaintiff's patients for plaintiff's services or collect plaintiff's fees, (5) did not control plaintiff's hours of work, other than scheduling for defendant's operating rooms and facilities, and (6) did not prevent plaintiff from holding appointments and privileges at other hospitals. The director concluded that defendant considered plaintiff an independent contractor.

On the other hand, plaintiff stated in his affidavit that he was subject to written requirements he considered contractual in nature, such as paying dues to defendant and abiding by defendant's reporting guidelines and rules, procedures, and bylaws. Further, plaintiff claimed he had been told that he was expected to do most of his surgeries using defendant's facilities. In addition, plaintiff was advertised as a "Beaumont doctor" and expected to perform [*10] any procedures related to referrals received as a "Beaumont doctor" at defendant's facilities. Plaintiff considers himself controlled by defendant's administration, and his billings are governed by the guidelines defendant negotiated with major insurance carriers.

We conclude that the facts presented by plaintiff and defendant are reasonably susceptible of the single inference that defendant is not plaintiff's employer. *Derigiotis, supra at 94.* While defendant requires a certain standard of care from plaintiff, as indicated by defendant's bylaws and Physician Handbook, defendant does not control the manner in which plaintiff performs his work, pay plaintiff, provide benefits to plaintiff, or dictate plaintiff's hours. Therefore, under the economic reality test, defendant is not plaintiff's employer.

Plaintiff next argues that he has the right to seek a civil action in court to remedy violations of his civil rights. Again, we disagree. Plaintiff's argument relies on the 1971 Michigan Supreme Court case of *Pompey v General Motors Corp, 385 Mich. 537; 189 N.W.2d 243 (1971),* superceded by statute as stated in *Mack v City of Detroit, 254 Mich. App. 498, 501;* [*11] *658 N.W.2d 492 (2002).* n2 However, this Court recently addressed the viability of *Pompey* in *Mack, supra at 501-502:*

> *Pompey, supra,* was decided under the now-repealed Fair Employment Practices Act (FEPA), *MCL 423.301 et seq.*, which prohibited race-based discrimination in private employment; however, the FEPA provided an aggrieved party with only administrative relief. The Court acknowledged the general rule that, when new rights or duties that did not exist at common law are created by statute, the remedy provided for enforcement of that right by the statute is exclusive. It also recognized that the rule presumptively applied because there was no preexisting, common-law remedy for employment discrimination. However, the Court noted that "the statutory remedy is not deemed exclusive if such remedy is plainly inadequate," and concluded that the plaintiff was not barred from bringing a civil suit to obtain full recovery for his damages. Thus, cumulative remedies were permissible under the FEPA because the act created new rights but itself did not provide for a civil cause of action to enforce those rights. [*12] In fact, all the comparable statutes mentioned in the discussion in *Pompey* shared this deficiency.
>
> n2 *Mack v City of Detroit, 254 Mich. App. 498, 501; 658 N.W.2d 492 (2002)* had not yet been released when plaintiff filed his appeal. However, the general rule is that judicial decisions are to be given full retroactive effect. *Lindsey v Harper Hosp, 455 Mich. 56, 68; 564 N.W.2d 861 (1997).*

In contrast, the remedies provided under the current Civil Rights Act are fully adequate. The act establishes the right to file a civil cause of action to recover damages and obtain injunctive relief, in addition to the right to initiate administrative proceedings before the Civil Rights Commission. *MCL 37.2801(1).* Therefore, the justification for allowing cumulative remedies for civil rights violations found in *Pompey* no longer exists, and the general rule with regard to the exclusivity of statutory remedies applies. This conclusion [*13] is supported by the fact that the current Civil Rights Act "limits complaints to causes of action for violations of the act itself." [Citations omitted.] Therefore, plaintiff's individual claims regarding the alleged violations of his civil rights are precluded because the CRA provides the exclusive remedy.

Likewise, plaintiff's claims under the Public Health Code, *MCL 333.21513(e)*, n3 are precluded because the Code (1) does not expressly create a private cause of action, and (2) provides an adequate means of enforcing its provisions. See *Mack, supra at 501-502.* The provisions of the Code that provide this means of enforcement are *MCL 333.20176*, *MCL 333.20177*, and *MCL 333.20199.* n4 The Code contains no provision allowing plaintiff to sue defendant.

> n3 *MCL 333.21513(e)* provides:
>
> (e) After December 31, 1989, [the owner, operator, and governing body of a hospital licensed under this article] shall not discriminate because of race, religion, color, national origin, age, or sex

in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

[*14]

n4 *MCL 333.20176* provides, in part:

(1) *A person may notify the department of a violation of this article* or of a rule promulgated under this article that the person believes exists. The department shall investigate each written complaint received and shall notify the complainant in writing of the results of a review or investigation of the complaint and any action proposed to be taken. Except as otherwise provided in sections 20180, 21743(1)(d), and 21799a, the name of the complainant and the charges contained in the complaint are a matter of public record. [Emphasis added.]

MCL 333.20177 provides:

Notwithstanding the existence and pursuit of any other remedy, the director, without posting a bond, may request *the prosecuting attorney or attorney general to bring an action in the name of the people of this state* to restrain, enjoin, or prevent the establishment, maintenance, or operation of a health facility or agency in violation of this article or rules promulgated under this article. [Emphasis added.]

MCL 333.20199 provides, in part:

(1) Except as provided in subsection (2) or section 20142, *a person who violates this article or a rule promulgated or an order issued under this article is guilty of a misdemeanor, punishable by fine* of not more than $1,000.00 for each day the violation continues or, in case of a violation of sections 20551 to 20554, a fine of not more than $1,000.00 for each occurrence. [Emphasis added.]

[*15]

Plaintiff next argues that the trial court erred in dismissing plaintiff's common law claims of detrimental reliance (i.e., estoppel) and defamation because the doctrine of judicial nonreviewability of private hospital staffing decisions is limited to contract claims. While plaintiff is correct regarding the applicability of the doctrine of judicial non-reviewability of private hospital staffing decisions being limited to contract claims, his common law claims are still precluded.

Under Michigan law, a private hospital is empowered to appoint and remove its members at will without judicial intervention and has the right to exclude any doctor from practicing therein. *Long v Chelsea Community Hosp, 219 Mich. App. 578, 586; 557 N.W.2d 157 (1996); Hoffman v Garden City Hosp-Osteopathic, 115 Mich. App. 773, 778-79; 321 N.W.2d 810 (1982).* However, this Court stated, in *Long, supra at 586,* that "the above law is limited to disputes that are contractual in nature." This Court then addressed the applicability of this doctrine regarding a claim of estoppel:

Regarding plaintiff's promissory estoppel claim, a claim of promissory [*16] estoppel is akin to a contract claim. Therefore, the rules from *Sarin [v Samaritan General Hosp, 176 Mich. App. 790; 440 N.W.2d 80 (1989)]* and *Hoffman, supra,* where this Court has expressed its reluctance to review a private hospital's staffing decisions, preclude review of this claim. [*Long, supra at 588-589* (citation omitted).]

Therefore, plaintiff's estoppel claim may not be reviewed under the doctrine of judicial nonreviewability of private hospital staffing decisions.

Plaintiff's claim for defamation is precluded because plaintiff signed a release relieving defendant and its employees from "any and all liability for their acts performed in good faith and without malice in the investigation, consideration, and evaluation of my reappointment . . . ." Further, defendant's bylaws contain express conditions regarding plaintiff's exercise of staff privileges relating to defendant's immunity from civil liability. Finally, *MCL 331.531*, the Public Health Code, provides, in part:

(1 A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological [*17] condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.

* * *

(3 *A person, organization, or entity is not civilly or criminally liable*:

(a For providing information or data pursuant to subsection (1).

(b For an act or communication within its scope as a review entity.

(c For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

(4 The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

(5 An entity described in subsection (2)(a)(v) or (vi) that employs, contracts with, or grants privileges to a health professional licensed or registered under article 15 of the public health code, *1978 PA 368, MCL 333.16101* to *333.18838*, *shall* report each of the following to the department of consumer and industry services not more than 30 days after it occurs:

(a Disciplinary action taken by the entity against [*18] a health professional licensed or registered under article 15 of the public health code, *1978 PA 368, MCL 333.16101* to *333.18838*, based on the health professional's professional competence, disciplinary action that results in a change of the health professional's employment status, or disciplinary action based on conduct that adversely affects the health professional's clinical privileges for a period of more than 15 days. As used in this subdivision, "adversely affects" means the reduction, restriction, suspension, revocation, denial, or failure to renew the clinical privileges of a health professional by an entity described in subsection (2 (a)(v) or (vi).

(b Restriction or acceptance of the surrender of the clinical privileges of a health professional under either of the following circumstances:

(i) The health professional is under investigation by the entity.

(ii) There is an agreement in which the entity agrees not to conduct an investigation into the health professional's alleged professional incompetence or improper professional conduct.

(c) A case in which a health professional resigns or terminates a [*19] contract or whose contract is not renewed instead of the entity taking disciplinary action against the health professional.

(6) Upon request by another entity described in subsection (2) seeking a reference for purposes of changing or granting staff privileges, credentials, or employment, an entity described in subsection (2) that employs, contracts with, or grants privileges to health professionals licensed or registered under article 15 of the public health code, *1978 PA 368, MCL 333.16101* to *333.18838*, *shall* notify the requesting entity of any disciplinary or other action reportable under subsection (5) that it has taken against a health professional employed by, under contract to, or granted privileges by the entity. [Emphasis added.] Since plaintiff premises his defamation claim on defendant's reports to the National Practitioner Data Bank, which appear to be privileged communications under MCL 333.531, defendant is immune from liability unless plaintiff can show that defendant acted with actual malice. MCL 333.531(4); *Veldhuis v Allan, 164 Mich. App. 131, 136-137;* [*20] *416 N.W.2d 347 (1987)*. Here, plaintiff offered no evidence that defendant acted with actual malice, i.e. with knowledge of the report's falsity or with reckless disregard of its truth or falsity, when reporting plaintiff's limitation of staff privileges. *Id.* Even if plaintiff did not agree with the conclusion reached by defendant, defendant factually reported the result of the investigation leading to the reduction of plaintiff's privileges.

Plaintiff also argues that it was unlawful for defendant, a public accommodation, to deny plaintiff staff privileges. Again, we disagree. *MCL 37.2302(a)* provides:

Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

As defendant notes, defendant is a public accommodation for the general public to receive medical care, but it is not a place of general accommodation for the medical profession to practice medicine. Defendant must necessarily [*21] be careful regarding the qualifications and competency of the physicians to whom it grants staff privileges. And, as noted, *supra*, defendant's staffing decisions are not judicially reviewable.

Finally, with regard to plaintiff's claim that summary disposition was prematurely granted, we find that the trial court's grant of summary disposition before the completion of discovery was proper in this case. As discussed, *supra*, there was no factual dispute regarding the factors considered under the economic reality test used to determine whether plaintiff was defendant's employee or an independent contractor. Since the trial court properly determined that plaintiff was an independent contractor, and only an employee may raise claims under the CRA, plaintiff's disparate treatment claims fail as a matter of law. Further, plaintiff's other claims fail as a matter of law, and additional factual findings were not necessary to resolve the issues presented.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Michael J. Talbot

B

46 of 57 DOCUMENTS

MACOMB HOSPITAL CENTER MEDICAL STAFF and SAMIR M. RAGHEB, M. D., Plaintiffs-Appellants, v DETROIT-MACOMB HOSPITAL CORPORATION, Defendant-Appellee, MICHIGAN STATE MEDICAL SOCIETY, THE AMERICAN MEDICAL ASSOCIATION, and MICHIGAN HEALTH & HOSPITAL ASSOCIATION, Amicus Curiae.

No. 182394

COURT OF APPEALS OF MICHIGAN

1996 Mich. App. LEXIS 1680

December 20, 1996, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: LC No. 94-003603.

DISPOSITION: Affirmed.

JUDGES: Before: Gribbs, P.J., and Saad and J. P. Adair, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINION: PER CURIAM.

Plaintiffs appeal the circuit court opinion and order granting defendant's, Detroit-Macomb Hospital Corporation's, motion for summary disposition. In its complaint below, plaintiffs alleged, inter alia, that defendant improperly and unilaterally amended hospital bylaws to expand podiatric privileges, and replaced the elected members of the medical executive committee and filled their positions with appointees. We affirm.

Plaintiffs argue that the medical staff bylaws constitute an enforceable contract. We do not agree. However, even assuming arguendo that the bylaws could represent a contract, defendant's actions here did not constitute a breach and plaintiffs have not suffered any compensable damage. Under the broad scope of the Public Health Code, defendant is responsible for the matters at issue and cannot delegate that statutory responsibility: [*2]

> The owner, operator, and governing body of a hospital licensed under this article:
>
> (a) Are responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital. *MCL 333.21513*; MSA 14.15(21513).

In this case, the trial court properly granted summary disposition as to defendant's amendment of the hospital bylaws to prevent discrimination against podiatrists in compliance with *MCL 333.21513(e)*; MSA 14.15(21513)(e), after the medical staff twice refused to amend the bylaws. Because the amendment was necessary to comply with state law, no genuine issue of material fact existed and summary disposition was proper.

The trial court did not specifically address plaintiff's claim that the replacement of the executive committee was improper, beyond the general finding that the bylaws were "essentially directed to the conduct of the medical staff." As a general rule, as the trial court noted, a private hospital's decisions regarding staff privileges is not reviewable. *Bhogaonker v Metropolitan Hospital, 164 Mich. App. 563, 566; 417 N.W.2d 501 (1988);* [*3] *Dutka v Sinai Hospital, 143 Mich. App. 170, 175; 371 N.W.2d 901 (1986).* See also *Muzquiz v WA Foote Memorial Hospital, Inc, 70 F.3d 422, 430 (CA 6 1995).* Moreover, the trial court recognized in its written opinion, that, under Michigan law, defendant is charged with responsibility for *all phases* of the operation of the hospital. *MCL 333.21513(a)*; MSA 14.15(21513). Defendant is also charged with responsibility for establishing the appropriate procedures for "effective review of the professional practices in the hospital." *MCL 333.21513(d)*; MSA 14.15(21513)(d). The trial court did not err in granting summary disposition in this matter.

Affirmed.

/s/ Roman S. Gribbs

/s/ Henry William Saad

/s/ James P. Adair

LEXSEE 2003 US DIST LEXIS 15994

HOON K. JEUNG, M.D., Plaintiff, v. DENISE McKROW, ROGER MARSHALL, K. MICHAEL WEAVER, DANIEL HITTLER, GARTH M. MURRAY, M.D. and HILLS & DALES GENERAL HOSPITAL, INC., Defendants.

CASE NO. 01-CV-10204-BC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

2003 U.S. Dist. LEXIS 15994

February 28, 2003, Decided
February 28, 2003, Filed

SUBSEQUENT HISTORY: Accepted by, in part, Rejected by, in part, Summary judgment granted, in part, summary judgment denied, in part by, Dismissed by, Remanded by, Motions ruled upon by *Jeung v. McKrow, 264 F. Supp. 2d 557, 2003 U.S. Dist. LEXIS 14703* (E.D. Mich., 2003)

DISPOSITION: [*1] Magistrate recommended that defendants' partial motion for judgment on the pleadings to dismiss and defendants' motion for summary judgment be granted and that case be dismissed with prejudice.

COUNSEL: For HOON K. JEUNG, plaintiff: Patrick McLain, Kerr, Russell, Detroit, MI.

For DENISE MCKROW, K. MICHAEL WEAVER, GARTH M. MURRAY, HILLS AND DALES GENERAL HOSPITAL, INCORPORATED, ROGER MARSHALL, DANIEL HITTLER, defendants: Karen B. Berkery, Kitch, Drutchas, Detroit, MI.

JUDGES: CHARLES E. BINDER, United States Magistrate Judge. DISTRICT JUDGE DAVID M. LAWSON.

OPINIONBY: CHARLES E. BINDER

OPINION:

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANTS' PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS TO DISMISS PURSUANT TO *RULE 12(c)* n1 (Dkt. 43) AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Under Seal) (Dkt. 76)

n1 Defendants have entitled their Reply (Dkts. 46 & 47) to be in opposition to Plaintiff's Response to a "Partial Motion for Summary Judgment on the Pleadings." (Dkt. 45.) In spite of the mischaracterizations made by both parties in the titles of their pleadings, I construe this motion to be a "Motion for Partial Judgment on the Pleadings." *See FED. R. CIV. P. 12(c).*

[*2]

I. RECOMMENDATION

IT IS RECOMMENDED that the motions be **GRANTED** and that this case be **DISMISSED WITH PREJUDICE.**

II. INTRODUCTION AND FACTS

Pending, pursuant to Orders of Reference from United States District Judge David Lawson, issued July 16 and July 22, 2002, (Dkts. 80 & 82), are the above-entitled motions. Defendants' Motion for Partial Judgment on the Pleadings (Dkt. 43) was filed February 15, 2002, and seeks dismissal of Counts II, III, V, VII, and VIII of Plaintiff's First Amended Complaint under *Rule 12(c) of the Federal Rules of Civil Procedure.* Plaintiff filed a response in opposition, along with exhibits (Dkt. 45), and Defendants filed replies. (Dkts. 46 & 47.) n2 Plaintiff then filed a supplemental response in opposition (Dkt. 48), and Defendants filed a reply brief. (Dkt. 52.)

n2 These two documents, although filed on different dates, are exact duplicates of each other.

Defendants' motion for summary judgment was filed July 12, 2002. (Dkt. 76.) This seventy-six [*3] paragraph motion seeks the entry of summary judgment as to

all the claims filed in Plaintiff's first amended complaint. Plaintiff has filed a response. (Dkt. 87.) Both parties have filed under seal voluminous sets of exhibits supporting their respective positions. n3 Oral argument on both motions was held on August 30, 2002.

> n3 Although I did not specifically require it, the parties never settled upon the very practical alternative of an agreed upon appendix of exhibits. In support of this motion, Defendants therefore filed 55 exhibits in two bound volumes. In support of its response, Plaintiff filed 36 exhibits in three bound volumes. Cumulatively, these exhibits total approximately ten inches in thickness. At least ten of the exhibits in the sets filed by each party are partial or exact duplicates of each other. These duplications will be noted as these exhibits are cited in the body of this report.

Plaintiff is a medical doctor who, between 1976 and 2001, exercised staff privileges at Defendant Hills & Dales [*4] General Hospital ("the Hospital") located in Cass City, Michigan. For substantially all of this period, Plaintiff was virtually the only general surgeon exercising privileges at the Hospital. (Tr. of Oral Argument, Dkt. 113 at 55-56.) In 2001, however, Plaintiff's privileges at the Hospital were summarily suspended. Plaintiff, who is of Korean origin n4 (Jeung Dep., Dkt. 87, Pl.'s Ex. D at 4; Dkt. 76, Defs.' Ex. 11 at 4), n5 claims that the suspension was imposed in violation of his federal civil rights under *42 U.S.C. §§ 1981 and 1983*, including his right to not be discriminated against on the basis of his race, as well as in violation of state law. (*See* First Am. Compl., Dkt. 21.) The defendants are the Hospital's Chief Executive Officer, the Chairperson, Vice-Chairperson, and Secretary/Treasurer of the Hospital's Board of Trustees, a surgeon at the Hospital, and the Hospital itself.

> n4 Although Plaintiff's original complaint (Compl., Dkt. 1 at P 62) and first amended complaint (First Am. Compl., Dkt. 21 at P 62) state that Dr. Jeung is a member of a minority, no specific minority is specified in either pleading. At oral argument, counsel for Plaintiff stated that Plaintiff is "an Asian American of the Oriental race." (Tr. of Oral Argument, Dkt. 113 at 50.)

[*5]

> n5 Hereafter, when referring to Plaintiff's and Defendants' exhibits, I will cite the exhibit number or letter and will omit the docket numbers.

Plaintiff alleges that the Hospital is "an eleemosynary institution organized under *Section 501(c)(3) of the Internal Revenue Code*. (First Am. Compl., Dkt. 21 at P 7.) Plaintiff alleges that the Hospital opened in 1960, and at that time offered memberships which entitled private citizens to vote for representatives on the Hospital Board of Trustees, which in turn managed the Hospital. (*Id.* at P 15.) Plaintiff alleges that over time the membership system fell into disuse and that vacancies on the Hospital Board of Trustees are now filled through nomination. However, as a result of this system, Plaintiff alleges that the Hospital is publicly controlled and that the Board of Trustees is "intended to and does reflect the local interest of the community." (*Id.* at P 17.) According to Plaintiff, the Hospital states that it has a "public mission" to provide health care to the community, and, as mentioned, enjoys "tax free status[. [*6]]" (*Id.* at PP 16 & 17.) Plaintiff alleges that the Defendant Hospital is "thus a quasi-public hospital with symbiotic relationship with the public sector." The complaint alleges that this symbiotic relationship creates "state action" and obligates Defendants to refrain from violating Plaintiff's constitutional rights.

Plaintiff alleges that in 1980 he entered into an oral agreement with the then Hospital's Chairman of the Board and CEO in which he agreed to build a medical office on land adjacent to the Hospital at his own expense in return for an agreement that the Hospital would provide the land at an inexpensive price and that upon Dr. Jeung's death, disability, or retirement, would purchase the land, the building, and Dr. Jeung's medical practice at then-current market value. (*Id.* at PP 20-24.) The complaint alleges that Dr. Jeung practiced at the Hospital and ultimately became its Chief of Staff. (*Id.* at P 25.) Plaintiff alleges that after a change in management at the Hospital, Plaintiff's relationship with the Hospital deteriorated. Allegations were made of shortcomings in Plaintiff's medical practice. Ultimately, on February 26, 2001, the Executive Committee of [*7] the Board of Trustees exercised summary suspension powers given it by the Hospital's bylaws and suspended Dr. Jeung's surgical privileges. (*Id.* at P 54.) Plaintiff allegedly threatened court action, and on March 16, 2001, the Hospital rescinded its summary suspension in return for a promise from Plaintiff that he would refrain from performing surgical procedures at the Hospital. (*Id.* at PP 57 & 58.)

Plaintiff originally filed this case in the Tuscola County Circuit Court. (Pl.'s Compl., Dkt. 1.) The case was removed to this Court on May 13, 2001. *(Id.)* After the grant of leave by Judge Lawson, Plaintiff's first amended complaint was filed on October 15, 2001. (Dkts. 20 & 21.) Plaintiff's first amended complaint pleads federal civil

rights claims of racial discrimination under *42 U.S.C. § 1981* and constitutional violations under *42 U.S.C. § 1983*. (First Am. Compl., Dkt. 21 at Counts I & II.) n6 The first amended complaint also contains six pendent state claims alleging tortious interference with business relationship, violation of *Michigan's Elliott-Larsen Civil Rights Act*, promissory estoppel, defamation, breach of the Hospital's [*8] bylaws, and civil conspiracy.

> n6 At oral argument, counsel for Plaintiff made clear that Count I is based upon racial discrimination, not national origin discrimination. (Tr. of Oral Argument, Dkt. 113 at 51.) Plaintiff's counsel also conceded that no civil rights claims are made against Defendant Dr. Murray. (*Id.* at 52.)

III. ANALYSIS AND CONCLUSIONS

A. Motion Standards

Defendants have filed their motion for partial dismissal pursuant to *Rule 12(c) of the Federal Rules of Civil Procedure. Rule 12(h)(2)* provides that the defense of failure to state a claim upon which relief can be granted (*see FED. R. CIV. P. 12(b)(6)*) may be raised by way of a motion under *Rule 12(c)* for judgment on the pleadings. When deciding a motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, "the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts [*9] in support of his claims that would entitle him to relief." *Cline v. Rogers, 87 F.3d 176 (6th Cir. 1996)* (citing *In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993)*). "While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions." *DeLorean, 991 F.2d at 1240* (citing *Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988)*).

A motion for summary judgment pursuant to *Rule 56(c) of the Federal Rules of Civil Procedure* will be granted where there is no genuine issue of material facts, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed 2d 538 (1986)*. The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. [*10] The moving party bears a considerable burden. The Court of Appeals for the Sixth Circuit has held that a

> District Court may grant a motion for summary judgment only if it finds from the whole record before it that there are no material facts which are in dispute. It may not make findings of disputed facts on a motion for summary judgment. The movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and that the evidence together with all inferences to be drawn therefrom must be considered in the light most favorable to the party opposing the motion. The movant's papers are to be closely scrutinized while those of the opponent are to be viewed indulgently.

Watkins v. Northwestern Ohio Tractor Pullers Asso., 630 F.2d 1155, 1158 (6th Cir. 1980) (citations omitted). *Ghandi v. Police Dep't of Detroit, 747 F.2d 338 (6th Cir. 1984)*.

Summary judgment is proper when the moving party shows that the non-moving party is unable to meet its burden of proof. *Celotex, 477 U.S. at 326*. However, to defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 191 L. Ed. 2d 202 (1986)*. [*11] It is the plaintiff's obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex, 477 U.S. at 324*.

Not every issue of fact or conflicting inference presents a genuine issue of material fact requiring the denial of summary judgment. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson, 477 U.S. at 247-48*. Irrelevant and unnecessary facts should have no bearing on a trial court's determination on a motion for summary judgment. *See id. at 248*. Accordingly, only germane facts that go to the heart of the party's suit deserve consideration. The courts will not entertain metaphysical doubts as material facts to defeat the motion. *Matsushita, 475 U.S. at 586*.

B. Federal Claims

1. Racial Discrimination Claim - *42 U.S.C. § 1981*

a. Introduction

Section 1981, as amended by the *Civil Rights Act of 1991*, provides that

> all persons within the jurisdiction of the United States shall have the same right in every State and Territory [*12] to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). The coverage of the statute "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *42 U.S.C. § 1981(b)*. These rights are protected from encroachment by both private and state actors. *42 U.S.C. § 1981(c)*.

Plaintiff argues that his suspension was the culmination of a long series of racially motivated discriminatory actions taken against him primarily since Defendant McKrow became CEO of the Hospital in 1994, and undertaken by every individual defendant with the exception of Dr. Murray. n7 Defendant moves for summary judgment on this count. The fact that many incidents took place during Plaintiff's 25-year relationship with the Hospital is not [*13] seriously disputed. n8 However, each party ascribes entirely contradictory interpretations to these events. The almost four hours of oral argument given by counsel provided material assistance in focusing the Court on those conflicting interpretations, and upon those portions of the 91 exhibits submitted by the parties n9 which support each interpretation.

n7 *See* footnote 5, *supra.*

n8 In their briefing, and to a lesser degree at oral argument, the parties raise a series of evidentiary objections to various exhibits. In the interest of completeness, I have reviewed all the exhibits filed by either party.

n9 The original exhibits were filed under seal pursuant to a stipulated protective order issued January 3, 2002. (Dkt. 32.)

b. Background

1970s and 1980s. Plaintiff obtained staff privileges at the Hospital in 1976 after completing a surgical residency in Saginaw, Michigan. (*See* Dkt. 87, Pl.'s Ex. EE.) Throughout the time Plaintiff exercised surgical privileges at the Hospital, [*14] he was never an employee of the Hospital. During his time at the Hospital, the staff physicians elected Plaintiff Chief of Staff on three separate occasions, and he was Chief of Staff at the time of his summary suspension. Of the 14 members of the active medical staff of the Hospital, the majority were non-Caucasian. (Hall Dep., Pl.'s Ex. E & Defs.' Ex. 4 at 9; Marshall Dep, Pl.'s Ex. C & Defs.' Ex. 3 at 118.)

It appears that Hills and Dales was often not a happy hospital. n10 During his association with the Hospital, Plaintiff experienced a number of difficulties with other staff members and employees. Many apparently believed that Plaintiff harassed them and displayed overbearing demeanor. (*See* Pl.'s Ex. A; Defs.' Exs. 8, 10, 14.)

n10 This is not intended as any indication of the quality of care given patients at the Hospital.

In mid-November 1983, Plaintiff received a memorandum from Ken Jensen, the Hospital Administrator at that time, which dealt with "significant complaints about your behavior amoung [*15] [sic] members of my staff. The complaints indicate you have been rude, as well as, ridiculing." (Defs.' Ex. 8, Memo dated November 17, 1983.) n11 The memorandum goes on to state:

> You are a knowledgeable and generous physician. However, it seems that you take pleasure in talking down to females and others who you may erroneously feel are beneath you. I will tolerate none of that! My people are important to me and the patients we serve. And while it is true they can be replaced when they misbehave, so can you. Don't forget this fact! In conclusion, I fully expect you to treat my people the same way you want to be treated.

(*Id.*)

n11 Documents said to be supportive of this statement can be found within this same exhibit. Because they are filed under seal, these documents are not here summarized.

In early December 1983, Mr. Jensen wrote a memorandum to the Director of Nursing, describing a meeting he had the previous day with Plaintiff. Mr. Jensen reported that Plaintiff "said he will try to [*16] be more congenial in the future." n12 (Defs.' Ex. 8, Memo dated December 1, 1983.)

n12 *See* footnote 11, *supra.*

In late May 1985, Mr. Jensen sent another letter to Plaintiff which stated, "Unfortunately, it has been brought to my attention once again that you have been short with some of our staff. In addition, we have received patient and family complaints as well, relative to your verbal abuse and obvious disregard for their feelings …. Please take this as a gentle reminder to treat those you deal with, with mutual respect." (Defs.' Ex. 8, Letter dated May 31, 1985.) n13

n13 *See* footnote 11, *supra.*

In early February 1987, Plaintiff wrote a memorandum to Dr. Richard Hall, Secretary of the medical staff, describing an incident which took place in the emergency room. (Defs.' Ex. 9, Letter dated February 7, 1987.) n14 Plaintiff [*17] stated that a female patient was admitted, and her family requested a specific physician, but he was unavailable at that time. Plaintiff stated in the memo that another physician engaged in what Plaintiff believed was unethical behavior, threatening the family if they did not choose that doctor to continue the care of the patient. The doctor was allegedly also very upset at a nurse who had informed him of the family's desires. Plaintiff felt that action should be taken against this physician.

n14 *See* footnote 11, *supra.*

In July 1987, Dr. Hall wrote a letter to the doctor accused of unethical practice by Plaintiff, stating in part, "I am happy to report we found no cause for further action, and have directed Dr. Jeung to verbally apologize to you, as it is apparent that he did not have all the facts. The Executive Committee now considers this matter closed." (Defs.' Ex. 9.)

In mid-July 1989, Plaintiff received a memorandum from Mr. Jensen stating that "Within the past 2 months many Registered Nurses have [*18] contacted me about negative remarks you have made to them in front of patients and family members." (Defs.' Ex. 8, Memo dated July 18, 1989.) After briefly describing a series of incidents, Mr. Jensen stated:

> I am deeply concerned about these situations. If you have any negative things to say to a Registered Nurse or any other hospital employee, it is to be communicated professionally, behind closed doors.
>
> [I] don't know what your problem is, but I can tell you that you have alienated the majority of our staff. Right now they don't like you very much!
>
> This note will also remind you that you practice here at Hills and Dales General Hospital at the pleasure of our Board of Trustees.
>
> Finally, you have no right to bully or bad mouth our staff and I want it to stop.

(*Id.*) n15

n15 *See* footnote 11, *supra.*

Nor is the first employment related litigation involving the Hospital to reach this Court. In *Johnson v. Hills & Dales General Hosp.,* Case No. 91-CV-10482-BC, Plaintiff [*19] was a black female physician employed by a company engaged to provide hospitals with physicians to staff emergency rooms. As summarized by the United States Court of Appeals for the Sixth Circuit:

> Under this arrangement, plaintiff worked at defendant Hills & Dales General Hospital for a number of weekends in the period between October 1989 and April 1990. During this time, she experienced some hostility from various hospital employees and was subjected on one occasion to a derogatory racial remark. The employees complained that plaintiff ordered excessive diagnostic testing and that she unnecessarily called in employees for weekend assignments. They also criticized the plaintiff's professional competence and, ultimately, wrote a letter to the hospital administration complaining about her performance. Based on this letter indicating discord between the staff and plaintiff, the hospital president asked MasterCare to assign a different physician to the Hills & Dales emergency room.
>
> Asserting that she had been reassigned because of racial discrimination, plaintiff sued the hospital, its president, and the members of the staff who had been critical of her. The complaint asserted claims [*20] arising under state law and various federal civil rights statutes, including allegations of a conspiracy under *42 U.S.C. § 1985(3).*

Johnson v. Hills & Dales General Hosp., 40 F.3d 837, 838 (6th Cir. 1994).

Plaintiff's Medical Building. In 1980, Plaintiff met

with the then-president and CEO of the Hospital at a restaurant in Saginaw. At that time, the Hospital owned adjacent land which was suitable for the construction of a medical building. During their discussions, the Hospital representatives offered to convey portions of the adjacent land to Plaintiff on favorable economic terms conditioned upon Plaintiff's willingness to construct a medical clinic. Plaintiff also claims that at that time, the Board President and CEO promised to purchase the land and Plaintiff's surgical practice upon Plaintiff's death, disability or retirement. This latter agreement was apparently never reduced to writing. Minutes from a Board of Trustees meeting in October 1980 indicate that the Board approved the sale of a lot to Plaintiff conditioned upon the construction of a medical clinic. (Pl.'s Resp., Dkt. 45, Ex. 1 at 493; *see also* Defs. [*21] ' Ex. 40.) Six months later, Plaintiff purchased another lot from the Hospital. At that time, the Board required construction of the medical clinic facility to begin within 60 days. (*Id.,* Ex. 2 at 681; *see also* Defs.' Ex. 40.) Three weeks later, the Board approved the sale of a third lot to Plaintiff on the same terms, specifying an interest rate well below the then-market real estate interest rate. (*Id.,* Ex. 3 at 683; *see also* Defs.' Ex. 40.) Plaintiff constructed the clinic building and thereafter served as the only general surgeon at the Hospital for a considerable period of time. None of these documents memorialize an agreement relative to the disposition of this property upon Plaintiff's death, disability or retirement.

Defendant McKrow. In 1994, Mr. Jensen was relieved as Hospital Administrator after a majority of the Board of Directors declined to adopt expansion proposals he endorsed. (Pl.'s Resp., Dkt. 87 at 1.) Defendant McKrow was thereafter hired as CEO of the Hospital. Plaintiff, at that time a member of the Hospital's Board of Trustees, apparently opposed McKrow's hiring, arguing that she was unqualified. (*Id.*) As will be seen below, disagreements [*22] between Plaintiff and McKrow continued to fester throughout Plaintiff's remaining association with the Hospital.

Dr. McErlean and Emergency Room Staffing. In 1996, Defendant McKrow is said to have hired Dr. McErlean as an emergency room physician. (First Am. Compl., Dkt. 21 at P 35.) This, according to Plaintiff, took place in spite of the fact that the doctor had been previously relieved of surgical privileges at a hospital in Dearborn as a result of alleged patient safety concerns. (Tr. of Oral Argument, Dkt. 113 at 53.) At oral argument, Plaintiff advanced this fact as evidence that Defendant McKrow was seeking to hire more Caucasian physicians. (*Id.*) Plaintiff asserts that Defendant McKrow also directed that the emergency room be staffed 24 hours a day even though there was an insufficient number of local physicians skilled in this specialty. As a result, physicians' assistants (PAs) often covered this duty. Plaintiff points to an incident in which a seriously injured patient was brought into the emergency room late at night, and Plaintiff was called in to assist. (*See* Compl., Dkt. 1 at PP 30-31; Tr. of Oral Argument, Dkt. 113 at 54.) Apparently, the medical [*23] staff committee was convened to review the case at the request of Defendant McKrow. Plaintiff was never disciplined; nor was adverse action taken against him by the committee as a result of its review of this case. (Defs.' Ex. 44.) Other alleged circumstances in which Dr. McErlean did not perform properly are outlined in Plaintiff's first amended complaint. (Pl.'s First Am. Compl., Dkt. 21 at PP 33-38.) Plaintiff complained, without effect.

Dr. Placeway and The Carroll Report. In 1999, Defendant McKrow hired Scott Placeway, D.O., a physician anesthesiologist, to work at the Hospital. Plaintiff found this doctor unacceptable and instead made use of a certified registered nurse anesthetist. Since Dr. Jeung was essentially the only surgeon practicing at the Hospital at that time, Dr. Placeway's services were severely underutilized. As a result, it is alleged that Dr. Placeway began engaging in a pattern of medicare billing fraud. (*See* Dkt. 87, Pl.'s Ex. B.) n16 Plaintiff allegedly complained to Defendants McKrow and Marshall, allegedly to no effect. (Pl's Ex. B; Defs.' Exs. 45, 46, 47, 48.)

n16 *See* footnote 11, *supra.*

[*24]

The Hospital agreed to provide and pay for a registered nurse anesthetist to work with Dr. Jeung. (Defs.' Ex. 47.) The Hospital's Compliance Committee also conducted a compliance review of the billing practices of Dr. Placeway. (Defs.' Ex. 48.) The Committee concluded that forms needed to be changed and that the allegations of fraud were not supported.

Defendant Marshall ultimately hired Charles Carroll, M.D., a general surgeon from Wisconsin, to investigate. Dr. Carroll had recently conducted a Joint Commission for Hospital Accreditation audit of the Hospital. In the latter months of 1999, Dr. Carroll prepared a report. At oral argument, counsel for Plaintiff stated that this was the most important exhibit in the case. (Tr. of Oral Argument, Dkt. 113 at 60.) Among other things, Dr. Carroll states that the introduction of anesthesiology services to the Hospital was a "poorly planned and executed process." (Pl.'s Ex. H at 1.) Dr. Carroll summarized patient complaints as well as appropriate protocols for use of a physician or registered nurse for anesthetist services in surgeries. Dr. Carroll stated that based upon interviews he undertook while at the Hospital, the Hospital's administration [*25]

was using "potential quality issues … to embarrass and undermine credibility of Dr. Jeung[.]" (*Id.* at 4.) Dr. Carroll went on to state: "The sense was administration was out to get him [Plaintiff]." (*Id.*) Later in the report, Dr. Carroll recites that "Individuals interviewed described the relationship of the administration toward Dr. Jeung as a vendetta and an attempt to discredit." (*Id.*) The Hospital administration was described to Dr. Carroll as "autocratic and dictatorial with a failure to grasp what type of relationships build cohesiveness and loyalty with physicians." (*Id.*) The doctor felt that the Hospital was taking actions which had the effect of competing against private physicians rather than attempting to "enhance their practices." (*Id.*) The doctor noted "cultural differences" said to exist between the Hospital and another nearby institution. At that institution, the doctor felt there was a "closeness a true sense of family, loyalty, respect, cohesiveness and sensitivity of physician needs." (*Id.* at 5.) Dr. Carroll closed his report by stating his hope that his recommendations would "assist you in making some productive improvements in a hospital [*26] that certainly has many high quality attributes." (*Id.*)

In late June 1999, an attorney representing Dr. Jeung sent a letter to Roger Marshall, the President of the Board of Trustees at that time. The letter advised that counsel had been retained "relative to certain concerns [Plaintiff] has raised with us in connection with the successful and profitable operation of the above institution." (Pl.'s Ex. Y; Defs.' Ex 43 at 1.) The letter states that "There have been repeated instances of discriminatory conduct directed towards minority members of the medical staff by the current administration." (*Id.*) The letter requested that the Board of Trustees "thoroughly investigate the allegations of discriminatory and improper conduct by the current administration and resolve the conflicts that exist between the current administration and certain minority members of the medical staff." (*Id.* at 2.) The letter concludes by stating that if the Board "fails to take any action, we will then advise Dr. Jeung and other interested parties of their rights and remedies since attempts at internal resolution would be futile." (*Id.*)

Although bordering upon a digression, the earlier audit [*27] conducted by Dr. Carroll bears some discussion. Defendant McKrow strenuously disagreed with the results of Dr. Carroll's audit. (Defs.' Ex. 50.) Defendant McKrow testified during her deposition that she had doubts about Dr. Carroll's objectivity. (Pl.'s Ex. X; Defs. Ex. 15 at 34 & 35.) Dr. Carroll's conclusions were overturned on appeal by the accrediting authority's general counsel. (Defs.' Ex. 51.) Defendants claim that Defendant Marshall and the Hospital's Executive Committee were unaware of these circumstances at the time Dr. Carroll was retained to review Dr. Placeway's billing practices. (Defs.' Mot. for Summ. J., Dkt. 76 at 11.)

After receipt of Dr. Carroll's report, the Hospital's Executive Committee met with Defendant McKrow, Dr. Jeung, and Dr. Placeway in attempts to resolve the issue. The Executive Committee decided to have another board member mentor Defendant McKrow in her management style to help improve relations. (Weaver Dep., Pl.'s Ex. I, Defs.' Ex. 12 at 78-79, 93-94; Hittler Dep., Pl.'s Ex. J, Defs.' Ex. 13 at 42, 43-45, 48, 53-54; Pl.'s Ex. C, Defs.' Ex. 3 at 59.)

New Hospital Surgeon. In December 1999, the Hospital hired Defendant Dr. Garth Murray as [*28] a general surgeon. He was brought into the Hospital as a hospital employee. As a result, Plaintiff alleges that the Hospital gained greater revenue from surgeries conducted by Dr. Murray than from surgeries conducted by Plaintiff. (Pl.'s Resp., Dkt. 87 at 5-6.)

Plaintiff's Summary Suspension, His Retirement & Aftermath. In the latter months of 2000, Plaintiff, then 61 years of age, approached Defendant Marshall reminding him of the Hospital's commitment to purchase his practice upon his retirement. (Marshall Dep., Pl.'s Ex. C, Defs.' Ex. 3 at 124.) At that time, Plaintiff informed Defendant Marshall that he intended to retire in approximately one year. After discussions with Defendant McKrow, two separate appraisers, one for Plaintiff's property and the other for his practice, were agreed upon and jointly compensated. Plaintiff's land and building were appraised at $350,000 by one appraiser (Tr. of Oral Argument, Dkt. 113 at 66) and his surgical practice was given a "going concern" value of $288,000 by the other appraiser. (*See Id.;* Pl.'s First Am. Compl. at P 101.) Plaintiffs counsel notes that the appraisals were effective on the date of Plaintiff's summary suspension. [*29] (Pl.'s Resp., Dkt. 87 at 4.)

In October of 2000, a patient made a direct complaint to Defendant McKrow relating to potential unnecessary surgery. (McKrow Dep., Pl.'s Ex. X, Defs.' Ex. 15 at 210-15; *see also* Defs.' Exs. 16 & 17.) n17 The Hospital conducted a review of this complaint. (Defs.' Exs. 17 & 18.) n18 Shortly thereafter, another physician wrote a letter to the Hospital expressing concern over unnecessary surgeries performed by Dr. Jeung, as well as his alleged poor quality of care. (Defs.' Ex. 19.) The matter was apparently forwarded to the Hospital's Medical Executive Committee which was chaired by Dr. Jeung at that time. (*Id.*) Dr. Jeung did not recuse himself from consideration of this matter. (Jeung Dep., Pl.'s Ex. D, Defs.' Ex. 11 at 290-92.) Ultimately, the matter appears to have been closed with no investigation having taken place. (Defs.' Ex. 19.)

n17 *See* footnote 11, *supra.*

n18 *See* footnote 11, *supra.*

In early December 2000, Dr. Murray wrote a letter to Defendant [*30] McKrow recounting a situation in which Plaintiff is said to have pressured another member of the medical staff to undergo surgery by Dr. Jeung instead of Dr. Murray. (Pl.'s Ex. F; Defs.' Ex. 20.) Dr. Murray felt that this was unethical conduct and that the matter should be investigated. (*Id.*) n19

n19 This letter serves as the gravamen of Count VI of Plaintiff's complaint.

Notes apparently made by Defendant McKrow indicate that on February 21, 2001, the same physician who had made the November 2000 complaint (Defs.' Ex. 19) made another complaint questioning Dr. Jeung's credentials to perform certain surgical services and the standard of care given patients. (*See* Defs.' Ex. 23.) n20 The doctor reduced his concerns to writing the same day. (Defs.' Ex. 24.) n21 Two days later, the Hospital received a notice of investigation from the State of Michigan, Department of Consumer and Industry Services, regarding Dr. Jeung's patient care. (Defs.' Ex. 26.) Other complaints were made in 2001 concerning Plaintiff's [*31] medical practices and decisions. (Defs.' Ex. 14.) n22

n20 *See* footnote 11, *supra.*

n21 *See* footnote 11, *supra.*

n22 *See* footnote 11, *supra.*

By late February 2001, the Hospital had thus received two requests for investigation of Dr. Jeung by other physicians, two direct patient complaints regarding allegedly unnecessary or improper care, and two malpractice lawsuits were pending against Plaintiff at that time. n23 As mentioned, the Hospital also received notice of an investigation by the Michigan Department of Consumer and Industry Affairs. (Defs.' Ex. 26.) n24 As a result, pursuant to Article VII, § 2(a) of the Hospital Medical Staff Bylaws, n25 Roger Marshall, Chairperson of the Board of Trustees, on February 26, 2001, summarily suspended all of Plaintiff's surgical privileges "effective immediately." (Defs.' Ex. 25.) n26

n23 One of the cases was tried to a verdict of no cause in the Tuscola County Michigan Circuit Court. Hills & Dales Hospital, a co-defendant in that case, settled with the plaintiff prior to trial. (Pl.'s Resp., Dkt. 87 at 7, ftn. 1.)

[*32]

n24 *See* footnote 11, *supra.*

n25 This provision reads:

Section 2. Summary Suspension

> **a. Criteria and Initiation** Any one of the following - the chair of the Executive committee, the Chief of the Medical Staff, the President, the Board, the Executive Committee of either the Medical Staff or the board shall each have the authority, whenever action must be taken immediately to protect the life of any patient or to reduce the substantial likelihood of serious injury or damage to the health or safety of any patient, employee or other person present in the Hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner, and such summary suspension shall become effective immediately upon imposition.

(Defs.' Ex. 27 at 22-23.)

n26 *See* footnote 11, *supra.*

Plaintiff claims that although Dr. Marshall handed Plaintiff this letter on February 27, 2001, he did not write it. Plaintiff claims that the typist of the letter is Defendant McKrow's secretary. (Pl.'s Resp., Dkt. 87 at 5.) Counsel for Plaintiff claims that Defendant McKrow [*33] was the "defacto perpetrator" of the summary suspension. (*Id.*) The summary suspension letter advised Plaintiff that he had 45 days to request a hearing under the bylaws and in accordance with the Health Care Quality Improvement Act. *42 U.S.C. § 11111.* On March 5, 2001, Plaintiff requested that hearing. (Defs.' Ex. 30.) Plaintiff had written to the Acting Chief of Staff four days earlier arguing that the Hospital did not follow proper procedure in the issuance of his summary suspension. (Defs.' Ex. 28.) Subsequently, Dr. Jeung and the Hospital agreed that the Hospital would withdraw the summary suspension in exchange for Plaintiff's agreement to refrain from performing surgery at the Hospital until the review was completed. (Defs.' Ex. 31.) The Hospital thereafter engaged the services of an entity called MetaStar to perform an independent review involving procedures performed by Dr. Jeung from February 2000 to February 2001. (Pl.'s Ex. M; Defs.' Ex. 33.)

Plaintiff filed suit in state court in mid-April 2001. (*See* Notice of Removal, Dkt. 1 at Ex. 1.) The case was removed to this Court on May 14, 2001.

The MetaStar report was completed and forwarded [*34] to Defendant McKrow on July 16, 2001. (Defs.' Ex. 34.) The lengthy report concludes by stating:

> Assuming the validity of the groups compared, these data suggest that Dr. Jeung's practice resulted in a significantly more aggressive practice pattern at Hills and Dales for these groups of admissions than was seen for the overall tri-county resident base.

(*Id.* at 07.) n27

> n27 The page numbers cited appear at the top right of the page. *See* footnote 10, *supra.*

Meanwhile, negotiations for the purchase and sale of Plaintiff's medical building continued (*see* Defs.' Ex. 41), and the Hospital initially declined to purchase Plaintiff's office. (*Id.*) Ultimately, a contract of sale was consummated for the sale of the building on August 31, 2001, for $378,800. (Defs.' Ex. 42.)

On September 25, 2001, Plaintiff notified the Hospital's Chief Operating Officer that he "would like to withdraw all [his] medical and surgical privileges at Hills and Dales General Hospital" effective October 1, 2001. (Pl. [*35] 's Ex. S.) The Hospital acknowledged this letter on November 15, 2001. (Pl.'s Ex. T.) In so doing, the Hospital noted the fact that it had previously initiated a medical review of his practice. The Hospital noted federal statutory provisions relating to this matter and informed Plaintiff that "if the Hospital accepts your request to relinquish your medical staff privileges, it will be required by both federal and state law to report your surrender of privileges and provide the information specified in the relevant statutes[.]" (*Id.* at 1-2.) The Hospital thus informed Plaintiff that were they to accept the surrender of his privileges under the circumstances, this would "also constitute an adverse action under the Medical Staff Bylaws, and would entitle you to a hearing under Article VIII of the Medical Staff Bylaws." (*Id.* at 2.) The letter then requested that Plaintiff "clarify your intentions in this matter." (*Id.*) Plaintiff was requested to respond within 45 days, and if he failed to do so, "the Board will assume that you wish no hearing in the matter, and desire the Board to accept your previous request to relinquish your medical staff membership and all clinical privileges. [*36] In such instance, the Board will send notification of its action to you, and shall report the same to federal and state authorities in accordance with applicable law." (*Id.*)

On December 14, 2001, Dr. McKrow sent a letter to Plaintiff recounting that on September 25, 2001, Plaintiff requested to resign his privileges, but subsequently withdrew that request. (Defs.' Ex. 35 at 1.) Defendant McKrow stated that the results of the MetaStar report "supports the imposition and continuation of the summary suspension of your clinical privileges." (*Id.*) She later stated that "As I indicated in my November 29, 2001 letter, we have construed your withdrawal of your request to resign your privileges as a request for hearing in this matter." (*Id.*) Plaintiff was informed that the hearing was scheduled for January 21, 2002. (*Id.*) The letter concluded with a list of witnesses who may be expected to testify and other matters pertinent to the conduct of the scheduled hearing.

On January 4, 2002, Plaintiff's counsel requested a three-month adjournment of this hearing. (Defs.' Ex. 36.) The hearing was ultimately held on April 18, 2002. (Defs.' Ex. 37.) The presiding officer was Lambert [*37] Althaver, a retired manufacturing executive who was also a member of the Hospital's Board of Trustees. (*Id.* at 2.) The hearing committee was comprised of two internal medicine specialists, a dairy farmer, and a member of the Hospital board, as well as the Chief Operating Officer of the Hospital. The hearing began with introductions, as well as Mr. Althaver's summary of the hearing procedure. He stated that the hearing would begin with an opening statement by the Hospital and then Hospital witness testimony. (*Id.* at 3.) Following the Hospital's presentation, Dr. Althaver stated that Plaintiff and his attorney would have an opportunity to make an opening statement and present witness testimony. Mr. Althaver stated that all witnesses would be subject to cross examination. After rebuttal presentations by both sides, "the hearing will be closed, everyone will be excused, and the committee will try to make their determination and prepare their written report." (*Id.*)

The hearing, however, never got past this initial procedural stage. After Mr. Althaver's description of the expected procedure, counsel for the Hospital stated that since he had expert witnesses who were not in the [*38] room, he requested Dr. Jeung's counsel to excuse two medical expert witnesses who were then in the hearing room. Counsel for Plaintiff objected, stating that there was no provision in the bylaws entitling the Hospital to exclude these witnesses from the hearing. Mr. Althaver then stated:

> MR. ALTHAVER: Our job as I see it is to hear and try to determine the facts around the summary suspension. Our job is not to determine the quality of the hospital's administra-

tion nor the competence of Dr. Jeung as a surgeon because certainly he has--as laypersons I don't think we could ever sit in judgment on that matter. As such we need to determine the facts surrounding the summary suspension and with that in mind I would agree with the hospital's attorney that witnesses will be brought in to testify specifically to the facts around the summary suspension having to do with the reasons for the summary suspension and for no other purpose and therefore I would ask that they leave the room

(Defs.' Ex. 37 at 8.)

Thereafter, the following exchange took place:

MR. MCLAIN [Dr. Jeung's Counsel]: How about logic you could offer them for it, these two witnesses.

MR. ALTHAVER: Well, that's [*39] our ruling, Mr. McLain. Let's go forward.

MR. MCLAIN: We respectfully decline to remove these witnesses.

MR. FRENCH [Counsel for the Hospital]: Gentleman, are you refusing to leave the room?

DR. BERGMAN: From my particular role as I see it is that I've been retained by a law firm in support of Dr. Jeung on three of the cases that are involved in this.

MR. FRENCH: Well, he's ruled that you're supposed to leave the room.

MR. MCLAIN: Let him finish.

MR FRENCH: I just want to know whether you're refusing to leave the room or not, because if you are-

DR. BERGMAN: I'm just explaining why I think I should remain in the room.

MR. FRENCH: I know why you want to stay here, but that's not the issue.

MR. ALTHAVER: As I see it as presiding officer I have authority over what goes on in this room. I am asking you to leave.

MR. MCLAIN: We don't think that's appropriate. Why can't you do what you're going to do in front of these two physicians?

MR. FRENCH: Wait a minute. He doesn't have to respond to your questions.

MR. ALTHAVER: I made the ruling and-

MR. MCLAIN: Are you the presiding officer or is he?

MR. ALTHAVER: I've made the ruling, Mr. McLain.

MR. MCLAIN: I understand. Then [*40] remove them.

DR. BERGMAN: Could I be allowed to finish my statement before I was interrupted?

MR. FRENCH: I object for him to explain anything.

MR. ALTHAVER: You know, I think we're clearly off to a bad start. The hearing is under the bylaws of Hills and Dales General - the medical staff bylaws of Hills and Dales General Hospital and as such I'm granted the authority to run the hearing as I see fit and therefore I'm asking you gentleman [sic] to step out until such time as you are called as a witness.

(Defs.' Ex. 37 at 8-10.)

The hearing concluded as follows:

MR. ALTHAVER: I've made my decision.

MR. MCLAIN: They're not leaving.

MR. ALTHAVER: Well, I guess we'll adjourn the hearing.

MR. MCLAIN: It's your hearing.

MR. ALTHAVER: Yes it is. And we'll have to make a decision based on the facts that we have.

MR. FRENCH: And just so the record is clear I want to make the record clear I think that by refusing to abide by the rulings of this committee Dr. Jeung has waived his right to a hearing on this matter. He has accepted the recommendation, or rather he's accepted the validity of the decision of the board and its December 14th - that's reflected in the December 14th [*41] letter wherein they found sufficient grounds to continue the summary suspension. Refusal to abide by the rulings of the committee, of the chair of the committee, is a waiver of the right to proceed under the bylaws and legally he has in effect accepted the validity of the decision by th

board and I just want to make my position clear on the record to that.

MR. ALTHAVER: All right. Any you've made your statement.

MR. MCLAIN: Just so the record is clear, I disagree with that statement, but I'm not going to pollute the record with a contraposturing statement.

MR. ALTHAVER: In the interest of trying to solve this problem, I would ask all of you to step out of the room and we'll take a recess and let the committee discuss this for five minutes.

DR. SILVA: Thank you, sir.

(Short recess taken.)

MR. ALTHAVER: After discussing the matter with the whole committee, we are all of one mind and that is we would ask the two gentlemen who are witnesses to leave the room until they are called. If they do not wish to do that or refuse to do that then we'll adjourn the hearing. No action, then the hearing is hereby adjourned and we'll go from there.

MR. FRENCH: Thank you very much.

(Defs. [*42] ' Ex. 37 at 13-15.)

On April 18, 2002, the Hearing Committee presented its report, signed by Mr. Althaver, which states in pertinent part:

> Dr. Jeung, through his attorney, refused to allow his witnesses to absent themselves from the hearing, except during their individual testimony, as requested by the Presiding Officer of the Committee. When asked directly to leave, the two witnesses refused and asked the Presiding Officer to physically remove them. Since Dr. Jeung refused to abide by the rules of the Hearing Committee, the hearing was adjourned at approximately 9:30 a.m.
>
> Since the Bylaws read, "*a practitioner who fails without good cause to … proceed at such hearing shall be deemed to have waived his/her rights* …" the committee upholds the decision of the Board of Trustees of Hills and Dales General Hospital to suspend the clinical privileges of Dr. Hoon K. Jeung.
>
> The rationale for this decision is that the facts presented in the letter of December 14, 2001 have not been refuted. The Bylaws state that '*the practitioner who requested the hearing shall have the burden of proving, by clear and convincing evidence, that the adverse recommendation or action* [*43] *lacks any factual basis or that such basis or the conclusions drawn there from are either arbitrary, unreasonable or capricious.*" That proof was not presented to the Committee, and the Committee has no alternative but to uphold the actions of the Hills and Dales Hospital Board of Trustees.

(Defs.' Ex. 38.) This report was forwarded to Dr. Jeung attached to a cover letter dated May 1, 2002. (Pl.'s Ex. V.)

The same day, Dr. Jeung's counsel sent a letter to Mr. Althaver, stating in part: "On Dr. Jeung's behalf I demand, not request, that the panel dismiss all charges against Dr. Jeung immediately. If you do not do so, we will take appropriate steps to seek legal redress for continuing violation of the law." (Defs.' Ex. 39.) The decision of the Hearing Committee was ultimately upheld by the Hospital Board of Directors, and a report of the summary suspension, as required by law, was forwarded to the State of Michigan. (Defs.' Mot. for Summ. J, Dkt. 76 at PP 36 & 37.)

On May 7, 2002, counsel for Dr. Jeung demanded appellate review of the adverse determination of the Board. (Pl.'s Ex. U.)

c. Discussion and Conclusions

Although *42 U.S.C. § 1981* does [*44] not explicitly use the word "race," it has been construed to prohibit "racial" discrimination in the making of private and public contracts. *St. Francis College v. Al-Khazraji, 481 U.S. 604, 609, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987)*. This prohibition on "racial" discrimination encompasses intentional discrimination on the basis of ancestry or ethnic characteristics. *See id. at 613* ("[A] distinctive physiognomy is not essential to qualify for *§ 1981* protection. If [plaintiff] can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under *§ 1981*."). A claim under *section 1981* requires proof of intentional or purposeful discrimination. *General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982)*; *Leonard v. City of Frankfort Electric and Water Plant, 752 F.2d 189, 193 (6th Cir. 1985)*. Victims of employment discrimination are

permitted to establish their cases through direct evidence of discrimination [*45] *Mitchell v. Toledo Hosp., 964 F.2d 577, 582 n.4 (6th Cir. 1992)* or through inferential and circumstantial proof, using the *McDonnell Douglas-Burdine* n28 burden of proof mechanism.

> n28 *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*; *Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).*

As that formulation is applied in the context of this case, Plaintiff would first be required to establish a *prima facie* case of discrimination by demonstrating that (1) he belongs to an "identifiable class[] of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics," *St. Francis College, 481 U.S. at 613*; (2) defendant intended to discriminate against him on that basis; and (3) defendant's racially discriminatory conduct abridged a contract or rights enumerated in *§ 1981(a). Pamintuan v. Nanticoke Memorial Hosp., 192 F.3d 378 (3rd Cir. 1999)* [*46] (also holding at a *§ 1981* claim required proof of intentional discrimination). If a *prima facie* case is established, the burden of production shifts to defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *See McDonnell Douglas, 411 U.S. at 802.* If the defendant is successful in meeting this burden, the plaintiff must produce evidence from which a reasonable factfinder could conclude either that the defendant's proffered justifications are not worthy of credence or that the true reason for the employer's act was discrimination. *Burdine, 450 U.S. at 256.*

At the threshold, I note that the vast panorama of facts presented by the parties easily obscures the contractual rights actually at issue. Plaintiff alleges that the contractual rights said to have been infringed by the Defendants' actions are the "benefits and privileges of his surgical privileges at the Hospital" (Pl.'s First Am. Compl., Dkt 21 at P 64) and Plaintiff's "right to enforce the Hospital's promise to purchase Plaintiff's surgical practice at a fair market price." (*Id.*, Tr. of Oral Argument, Dkt. 113 at 17, 19.) With this focus, I therefore turn to [*47] the direct consideration of Plaintiff's discrimination claim.

I first conclude that there is, on the record presented by the parties, no direct evidence of ethnic or racially based discrimination on the part of Defendants. I fail to find in the exhibits proffered by either party any direct reference to Plaintiff's race, ethnicity, national origin or culture. Although Dr. Carroll states his belief that others at the hospital were "out to get" Plaintiff (Pl.'s Ex. H at 4), I find no indication that this desire is motivated by racial animus. Instead Dr. Carroll's opinions can be read to indicate that any such motivation was economic, rather than racial. (*Id.*, Item 6, second paragraph.) While Dr. Carroll refers in his report to "cultural differences" (*id.* at 4-5), I suggest that the context makes clear that Dr. Carroll is referring to the institutional culture of hospitals, rather than an individual's ethnic cultural background. I therefore conclude that in order to prevail on this count, Plaintiff must do so under the burden-shifting framework outlined above.

Turning then to the existence on this record of a *prima facie* case, taking the elements set forth above in reverse [*48] order, I first harbor considerable doubt that the contractual rights advanced by Plaintiff are sufficient to support the finding of a *prima facie* case. As noted, Plaintiff was never an employee of the Hospital. Instead, he was an independent physician who obtained his own office, and who had been accorded staff privileges under the provisions of the Hospital's medical staff bylaws. (Defs.' Ex. 53.) Michigan courts have held that medical staff bylaws do not create enforceable contract. *See Macomb Hosp. Center Medical Staff v. Detroit-Macomb Hosp. Corp., 1996 Mich. App. LEXIS 1680, No. 182394, 1996 WL 33347517* (Mich. Ct. App. Dec. 20, 1996) (unpublished). Furthermore, a promise by the Hospital to purchase Plaintiff's medical building and practice at the time of his retirement was never reduced to writing. As a result, it could be subject to Michigan's statute of frauds. *MICH. COMP. LAWS § 440.2201.*

Presuming that Plaintiff in fact possesses identifiable contractual rights within the meaning of *§ 1981*, I will presume that Plaintiff belongs to an identifiable race within the meaning of *42 U.S.C. § 1981(a)*. However, I suggest that the record presented fails to substantiate [*49] Plaintiff's claim that Defendants intended to discriminate against him on the basis of his race. Plaintiff's summary suspension was based upon direct complaints by other medical staff, many of whom were of racial minorities themselves. Review of these complaints, and others, show that they were based not upon Plaintiff's race, his culture or his ethnicity, but upon the methods he chose to use in his practice of medicine. Plaintiff's summary suspension was also based upon the existence of more than one medical malpractice action pending against him at the time. The evidence presented by the parties is entirely devoid of any implication that these malpractice actions were motivated in any way by Plaintiff's race. In addition, neither Dr. Carroll's report (Pl.'s Ex. H; Defs.' Ex. 49) nor the June 29, 1999, letter from the attorney (*see* Pl.'s Ex. Y; Defs.' Ex. 43) determine the issue of discrimination or the issue of discriminatory intent. Nor do they provide evidence of that alleged discrimination or discriminatory intent.

Observations of another district court made in the context of a Title VII case apply equally, I suggest, to Plaintiff's claims of racial discrimination in this [*50] case:

> Title VII does not provide a remedy for personal or professional conflicts or animosity unless there is some evidence of impermissible racial animus. *See, e.g., Neratko v. Frank, 31 F. Supp. 2d 270, 284 (W.D.N.Y. 1998)* ("title VII prohibits discrimination; it is not a shield against harsh treatment at the work place. **Personal animosity is not the equivalent of … discrimination** and is not proscribed by Title VII. **The plaintiff cannot turn a personal feud into a … discrimination case by accusation.**"). (emphasis added) (citations and internal quotation marks omitted).

Jenkins v. N.Y. Dep't of Corr., 2002 U.S. Dist. LEXIS 1997, No. 01-*CIV-0754, 2002 WL 205674* at *8 (S.D.N.Y. Feb. 2, 2002) (unpublished). For these reasons, I suggest that Plaintiff has failed to state a *prima facie § 1981* racial discrimination case.

Presuming Plaintiff had presented a *prima facie* case, I suggest that the Hospital has come forward with legitimate nondiscriminatory reasons for the actions taken against him. As mentioned, the complaints cited in the Hospital's summary suspension relate directly to his practice of medicine and were made in some cases by minorities themselves, [*51] as well as the medical malpractice actions then pending against Plaintiff. Nor, as mentioned, can discriminatory intent be inferred from the existence of more than one malpractice action pending against Plaintiff at the time the summary suspension letter issued.

I next suggest that Plaintiff has failed to produce evidence from which a reasonable factfinder would conclude that the justifications proffered by the Hospital for Plaintiff's summary suspension are not worthy of credence. *See Burdine, supra.* Furthermore, allegations that the Hospital may have treated Plaintiff badly do not constitute proof of pretext. In *Shah v. General Electric Co., 816 F.2d 264 (6th Cir. 1987)*, the Court held that complaints such as a supervisor's unwillingness to shake the plaintiff's hand or answer his memos, considered in the light most favorable to the plaintiff, did not "raise an inference of discrimination." The fact that Plaintiff vigorously disagreed with the Hospital's assessment of his medical performance is not sufficient to establish that the articulated reasons for his suspension were pretextual. *See Warfield v. Lebanon Corr. Inst., 181 F.3d 723, 730 (6th Cir. 1999)*; [*52] *Ang v. Proctor & Gamble Co., 932 F.2d 540, 548-49 (6th Cir. 1991).*

Although research has revealed the existence of relatively few recent cases involving the suspension of independent physicians exercising staff privileges at hospitals, courts have dismissed claims made by physicians exercising hospital staff privileges on facts arguably stronger than those presented in this case. In *Van v. Anderson, 199 F. Supp. 2d 550 (N.D. Texas 2002)*, plaintiff was a Vietnamese cardiologist granted privileges by the defendant hospital. Even though at one point he was threatened with adverse action because of the number of "oriental" patients he treated, the Court found plaintiff's *§ 1981* claims unavailing. The court first held that under Texas law, plaintiff had no contractual rights enforceable under *§ 1981*, stating:

> Similarly, Plaintiff's *Section 1981* claims against Defendants Anderson and Schwade also fail here since he has not provided the court with any evidence to prove the existence of a contractual relationship with either of them outside his alleged contract with the Defendant Hospital based on being granted staff privileges or its adoption of [*53] the medical staff bylaws. *See* Pl.'s Orig. Compl. at 7.

Van, 199 F. Supp. 2d at 564. The court then held that the comments regarding his patients failed to constitute the necessary discriminatory intent, stating:

> Although Dr. Anderson's statements could well be interpreted as evidence of a general bias against "Oriental patients," they are not so clear as to provide evidence of any direct racial bias against Dr. Van. In fact, these statements require too many inferences and presumptions to reach such a conclusion, as Plaintiff himself acknowledges, their meaning is quite unclear.

(*Id. at 567.*) Nor did the court find the alleged irregularities in the process of dismissing the plaintiff to supply sufficient evidence of discrimination. The court reasoned:

> Taking Dr. Van's allegations of Dr. Anderson's statements as true, as the Court must do at this summary judgment stage, and noting that during the April 1999 hearing numerous errors and false medical facts were

> discovered in both Dr. Schwade's testimony and in the attachment to the CPIC report, *see* Pl.'s Br. at 5-14 (Van Aff. at 2-13), the Court finds this evidence [*54] is sufficient to raise an issue as to whether Plaintiff was actually "qualified" and the initial peer review was bogus. However, even assuming this, the court cannot find any evidence to support Dr. Van's allegations that he suffered some adverse employment action despite these qualifications. To the contrary, by his own admission, Plaintiff continued to enjoy admitting privileges at the hospital until he allowed them to expire in June of 2000.

Id. at 568.

As to this latter point, the instant case is analogous. Here, Plaintiff was apparently not denied all privileges at the Hospital, the dispute here centering on his surgical privileges. (Pl.'s Ex. T; Defs.' Ex. 35.)

Although distinguishable on its facts, *Ahmad v. Nassau Health Care Corp., 234 F. Supp 2d 185 (E.D.N.Y 2002)* is instructive. In that case, plaintiff held a salaried position at the hospital and was dismissed. Plaintiff sued, alleging violations of *§ 1981* predicated in part upon jokes which plaintiff interpreted as being derogatory of his Pakistani origin as well as his short stature, and remarks that there were "too many foreign graduate students in the Department of Medicine. [*55] " *Id. at 193.* The court found none of these incidents sufficient to support a *§ 1981* claim:

> … In any event, "not all comments that reflect a discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision …. In particular, stray remarks in the workplace, … and statements by decision makers unrelated to the decisional process are not by themselves sufficient to satisfy plaintiff's burden of proving pretext."

Id., (quoting *Burrell v. Bentsen, 1993 U.S. Dist. LEXIS 18005, 1993 WL 535076,* at *8 (S.D.N.Y. Dec. 21, 1993), *aff'd, 50 F.3d 3 (2d Cir. 1995)* (citation and internal quotation marks omitted) (quoting *Price Waterhouse v. Hopkins, 490 U.S. 228, 278, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)* (O'Connor, J., concurring))).

For all these reasons, I therefore suggest that the grant of Defendants' motion for summary judgment as to Count I is appropriate.

2. Civil Rights Claim - *42 U.S.C. § 1983*

Count II alleges violation of *42 U.S.C. § 1983.* Plaintiff claims that Defendants disregarded patient safety [*56] concerns raised by Plaintiff relating to other Caucasian physicians at the Hospital. Plaintiff alleges that these were matters of public concern and that the Defendants' actions violated Plaintiff's constitutionally protected *First Amendment* rights. (Pl.'s First Am. Compl., Dkt. 21 at PP 67-71.) Plaintiff further alleges that Defendants acted in retaliation for Plaintiff's exercise of protected speech "using the constitutionally impermissible criterion of race[.]" (*Id.* at PP 72-73.) As to the Hospital, Plaintiff alleges that it is an eleemosynary institution organized under *§ 501(c)(3) of the Internal Revenue Code.* (*Id.* at P 7.)

The essential elements of a claim under *42 U.S.C. § 1983* are that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived the plaintiff of rights, privileges, or immunities secured by the constitution or laws of the United States. *Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 240 (1981).* "Absent either element, a *section 1983* claim will not lie." *Christy v. Randlett, 932 F.2d 502, 504 (6th Cir. 1991).* [*57] The statute does not create any substantive rights, but merely acts as a procedural vehicle to bring into court deprivations of rights secured by the Constitution and laws of the United States. *Lugar v. Edmondson Oil Co., 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).*

Defendants contest the first element, arguing that the Hospital is not a "state actor" within the meaning of *42 U.S.C. § 1983.* The Supreme Court has explained that

> the traditional definition of acting under color of state law requires that the defendant in a *§ 1983* action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law …. To constitute state action, the deprivation must be caused by the exercise of some right or privilege created by the State … or by a person for whom the State is responsible and the party charged with the deprivation must be a person who may fairly be said to be a state actor. State employment is generally sufficient to render the defendant a state actor.

West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) [*58] (internal quotations and citations omitted). Moreover, the Court has stated that "to act 'under color of' state law for *§ 1983* purposes does not require

that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents." *Dennis v. Sparks, 449 U.S. 24, 27, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).*

I suggest that Defendants' arguments as to Count II carry the day. First, Plaintiff nowhere alleges that any of the individual Defendants acted under any state authority, or were clothed with any state authority. Plaintiff does not allege that the Hospital is a state institution. As to Plaintiff's arguments that the Hospital is a quasi-public entity enjoying a symbiotic relationship with the state, the argument fails to pass muster in light of the consistent line of cases holding that non-governmental hospitals, even those receiving federal funding and tax exempt status are not state actors under *42 U.S.C. § 1983. See Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984)* (receipt of Hill-Burton construction funds, Medicare and Medicaid funds, and tax exempt status does [*59] not transform an otherwise private hospital into a governmental actor); *Hodge v. Paoli Memorial Hospital, 576 F.2d 563 (3rd Cir. 1978)* (receipt of Hill-Burton funding, Medicare and Medicaid funds, tax exempt status and state licensing requirement does not convert private nonprofit hospital into a state action under *Section 1983*); *Kaczanowski v. Medical Center Hospital, 612 F. Supp. 688 (D. Vt. 1985)* (showing that a private hospital receives Hill-Burton funds, enjoys tax exemptions and has licensing privileges from the state is insufficient to establish state action in the denial of staff privileges); *Johnson v. Southwest Detroit Community Mental Health Services, 462 F. Supp. 166 (E.D. Mich. 1978)* (private, not for profit, tax exempt corporation not a state action even though it was heavily regulated, served the public and governmental funding comprised most its budget); *Spencer v. Community Hospital of Evanston, 393 F. Supp. 1072 (N.D. Ill. 1975)* (fact that hospital receives public funding and performs services for the state does not make a hospital a state actor); *Crowder v. Conlan, 740 F.2d 447, 449-453 (6th Cir. 1984)* [*60] (hospital was not a state actor, even though it derived revenue from governmental sources, is subject to extensive state and federal regulation, had public officials sitting on its board of directors and was purchased by the county and leased back to board of trustees); *Jackson v. Norton—Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973)* (private hospital's action of discharging a physician was not state action within the meaning of *section 1983* even though hospital received Hill-Burton funds and was subject to extensive state regulations).

Accordingly, I suggest that Defendants' motion to dismiss Count II of Plaintiff's complaint be granted.

C. Pendent State Law Claims

Because I conclude that Plaintiff has failed to make out a federal cause of action under either *42 U.S.C. § 1981* or *§ 1983*, I suggest that the Court decline to exercise its discretionary jurisdiction over Plaintiff's remaining pendent state claims. However, in the interest of completeness and for judicial economy on review, each of these remaining counts will be briefly considered.

D. Count III - Tortious Interference

Plaintiff alleges in this count that [*61] a business relationship existed "with regard to his surgical privileges at the Hospital." (Compl., Dkt. 1 at P 76.) Plaintiff alleges that each defendant, with the exception of Dr. Murray, knew of "the promise the Hospital made to purchase Dr. Jeung's surgical practice at fair market value." (*Id.* at P 77.) Plaintiff alleges that at least Defendants McKrow, Marshall, Weaver, and Hittler "interfered with these business relations[.]" (*Id.* at P 79.)

In Michigan, in order to "maintain a cause of action for tortious interference, the plaintiffs must establish that the defendant was a 'third party to the contract or business relationship.'" *Reed v. Michigan Metro. Girl Scout Counsel, 201 Mich. App. 10, 13, 506 N.W.2d 231*; *201 Mich. App. 10, 506 N.W.2d 231 (1993). See also Patillo v. Equitable Life Assurance Soc'y, 199 Mich. App. 450, 457, 502 N.W.2d 696 (1992)*; *Feaheny v. Caldwell, 175 Mich. App. 291, 304, 437 N.W.2d 358*; *199 Mich. App. 566, 502 N.W.2d 358 (1989)*. I suggest that there is no "third party" interfering with the business relationship alleged by Plaintiff. Every defendant alleged to have interfered is in fact a party to the alleged relationship, since every one [*62] of them are agents of the Hospital and are alleged by Plaintiff to have been acting in that capacity. Thus, while it may be theoretically possible for a physician to plead a tortious interference cause of action, Plaintiff cannot under Michigan law successfully maintain a tortious interference of contract claim against these defendants.

E. Count IV - *Elliot-Larsen Civil Rights Act*

Citing *Michigan Compiled Law § 37.2302a*, Plaintiff alleges that the actions of Defendants denied him "his right to full and equal enjoyment of the privileges, in this instance surgical privileges[.]" (Compl., Dkt. 1 at P 91.) Plaintiff claims that this denial of privileges was in violation of the following portion of *Michigan's Elliott-Larsen Civil Rights Act*:

> (1) This section applies to a private club that is defined as a place of public accommodation pursuant to section 301(a).
>
> (2) If a private club allows use of its facilities by 1 or more adults per membership, the use must be equally available to all adults entitled to use the facilities under the mem-

> bership. All classes of membership shall be available without regard to race, color, gender, religion, marital status, or national origin. [*63] Memberships that permit use during restricted times may be allowed only if the restricted times apply to all adults using that membership.
>
> (3) A private club that has food or beverage facilities or services shall allow equal access to those facilities and services for all adults in all membership categories at all times. This subsection shall not require service or access to facilities to persons that would violate any law or ordinance regarding sale, consumption, or regulation of alcoholic beverages.
>
> (4) This section does not prohibit a private club from sponsoring or permitting sports schools or leagues for children less than 18 years of age that are limited by age or to members of 1 sex, if comparable and equally convenient access to the club's facilities is made available to both sexes and if these activities are not used as a subterfuge to evade the purposes of this article. P.A. 1976, No. 453, § 302a, added by P.A. 1992, No. 70, § 1, Imd. Eff. May 29, 1992.

MICH. COMP. LAWS § 37.2302a

At the threshold, I fail to see how this statute applies to the facts alleged in Plaintiff's complaint. Even if it did, I suggest that the arguments raised by Defendants to the effect [*64] that Plaintiff's exercise of surgical privileges was not within the scope of the *Elliott-Larsen Civil Rights Act* has merit. n29 Important insight as to the scope intended by the Michigan legislature for this statute appears, I suggest, in earlier provisions of the Act.

> The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodation, public service, and educational facility without discrimination because of religion, race, color, national origin, age, sex, height, weight or marital status as prohibited by this act, is recognized and declared to be a civil right.

MICH. COMP. LAWS § 37.2102(1).

> n29 I concur with the representations of both parties that there is at this time no Michigan appellate case law directly on point.

Presuming, as I do, that the Hospital is a "public accommodation" within the meaning of this statute, if Plaintiff alleged he was denied *admission as a patient* due to his national origin, I suggest he might [*65] have a cause of action against the Hospital under this statute. However, as the Defendants correctly point out in their summary judgment motion (*see* Dkt. 76 at 16), Plaintiff is *not* a member of the public to the extent he exercises surgical privileges in the Hospital. It goes without saying that medical staff privileges are not something open to the public at large, but, as is made evident in the record presented by the parties, an endeavor rigorously governed by both the Hospital's medical staff bylaws and by statute. I therefore suggest that on this basis, claims made by Plaintiff under this count fail.

Furthermore, even if the relationship alleged in Plaintiff's complaint were a pure employer-employee relationship, I suggest Plaintiff's Elliott-Larson claim would fail. As noted above, in order to establish a *prima facie* case of racially discriminatory discharge in violation of Title VII, plaintiff has the burden of proof to establish the existence of racially discriminatory intent in his dismissal. *See McDonnell Douglas, 411 U.S. at 802*; *Leonard, 752 F.2d at 193*. The same analysis and evidentiary burdens apply to both Title VII and [*66] Elliot-Larsen claims. *See Nixon v. Celotex Corp., 693 F. Supp. 547, 554-55 (W.D. Mich. 1988)*. Thus, for the reasons set forth above as to Plaintiff's federal discrimination claim, I similarly suggest that this state law claim also fails.

F. Count V - Promissory Estoppel

As to this claim, I suggest that Defendants' arguments carry the day. I suggest that Plaintiff's endeavors to distinguish the case of *Hazime v. Martin Oil of Indiana, Inc., 792 F. Supp. 1067, 1069 (E.D. Mich. 1992)* are unavailing. I further suggest that Plaintiff's reliance upon *Burton v. Daya, 1994 U.S. Dist. LEXIS 13527 (W.D. Mich. 1993)* (see Dkt. 45 at Ex. 5) is misplaced, as the facts alleged in that case took place over a period of days, not multiple years, as in the instant case.

G. Defamation

Plaintiff claims that Defendant Murray defamed him in the letter dated December 6, 2000, which Defendant Murray authored to Defendant McKrow. (*See* Dkt. 87, Pl.'s Ex. F.) Under Michigan law, to prevail on this claim, Plaintiff must prove a false and defamatory statement, the unprivileged publication of that statement to a third party, and fault amounting [*67] to at least negligence on the part of the publisher. *See Postill v. Booth Newspapers, Inc., 118 Mich. App. 608, 325 N.W.2d 511 (1982)*. As is

universally understood, truth is an absolute defense.

I first suggest that there is considerable doubt as to whether or not there was "publication" within the meaning of the doctrine of defamation as understood in Michigan. Defendant Murray's letter was forwarded within the "chain of command" of the Hospital. I am aware of no evidence that Dr. Murray published his letter to others outside the Hospital or agents thereof. Moreover, in light of the corroboration given vital parts of Dr. Murray's letter through deposition testimony, I fail to find the level of culpability required for the successful allegation of a defamation claim on the basis made here by Plaintiff.

H. Breach of Medical Staff Bylaws

As to this claim, I suggest that Defendants are correct that under Michigan law courts are not permitted to review a private hospital's staffing decisions, and that this Court lacks subject matter jurisdiction over this claim. *See Long v. Chelsea Comm. Hosp., 219 Mich. App. 578, 586, 557 N.W.2d 157 (1996)* ("A [*68] breach of contract and breach of bylaws claim would necessarily invoke a review of the hospital's decision to terminate its employees …. This Court in *Sarin* determined that the review of such claims would intervene in a hospital's decision and would interfere with the peer review process"); *Sarin v. Samaritan Health Cent., 176 Mich. App. 790, 792-93, 440 N.W.2d 80 (1989)* (a private hospital is empowered to appoint and remove its members at will and without judicial intervention); *Bhogaonker v. Metropolitan Hospital, 164 Mich. App. 563, 417 N.W.2d 501 (1987)* (the trial court lacked subject matter jurisdiction over the plaintiff's claim that sought review of a hospital's termination of a physician's employment because "such a decision is not subject to review by the circuit court."); *Veldhuis v. Central Mich. Comm. Hosp., 142 Mich. App. 243, 369 N.W.2d 478 (1985)*, ("the hospital's decision to suspend plaintiff's staff privileges is not subject to review by the circuit court."); *Dutka v. Sinai Hospital of Detroit, 143 Mich. App. 170, 175, 371 N.W.2d 901 (1985)*, ("our reading of the complaint lead us to the conclusion [*69] that [plaintiff] is actually seeking judicial intervention into the decision of a private hospital to deny him staff privileges. A decision of this nature is not a proper matter for judicial intervention.").

I suggest that for the reasons set forth above with regard to Plaintiff's discrimination claims, counsel's citation to *Long v. Chelsea Comm. Hosp., 219 Mich. App. 578, 557 N.W.2d 157 (1996)* is unavailing.

I. Count VII - Civil Conspiracy

I suggest that this claim has been conclusively determined against Plaintiff by the Sixth Circuit in *Johnson v. Hills & Dales General Hosp., 40 F.3d 837, 839 (6th Cir. 1994)*.

IV. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in *28 U.S.C. § 636(b)(1)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. [*70] The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *See Willis v. Sullivan, 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER

United States Magistrate Judge

DATED: February 28, 2003